138-573
138-573.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 854. 528

T. P. HEATH, PLAINTIFF IN ERROR,

vs.

M. T. WALLACE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED OCTOBER 8, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 24, 1889.

a *Transcript on Appeal from the Superior Court of San Joaquin County, California.*

In the Supreme Court of the State of California.

T. P. HEATH, Plaintiff and Appellant,
vs.
M. T. WALLACE, Defendant and Respondent. } No. 11492.

John B. Hall, attorney for appellant.
W. L. Dudley, attorney for respondent.

Filed ——, 1886.

——— ———, *Clerk*,
By ——— ———,
Deputy Clerk.

1 In the District Court of the Fifth Judicial District of the State of California, in and for the County of San Joaquin.

T. P. HEATH, Plaintiff,
vs.
M. T. WALLACE, Defendant.

Complaint.

The said T. P. Heath, hereinafter styled plaintiff, complains of the said M. T. Wallace, hereinafter styled defendant, and for cause of action against the said defendant respectfully states to the court—

2 That on the first day of August, A. D. 1876, the said plaintiff was the owner and ever since has been and is now the owner and entitled to the possession of that certain tract of land situated in the said county of San Joaquin, in the said State of California, particularly described as follows: Commencing at the common corner of sections 14, 15, 22, and 23, thence east one-half of a mile; thence south one-half of a mile; thence west one-half of a mile; thence north one-half of a mile to the place of beginning, the said tract being the northwest quarter of said section twenty-three (23), in township three (3) north, range seven (7) east, Mount Diablo meridian, and containing one hundred and sixty acres, according to a United States survey of the said township and the lands included therein.

That on or about the first day of September, A. D. 1876, the said defendant ousted the said plaintiff from the possession of the said tract of land, and the said defendant then and there took possession thereof, and thence hitherto has unlawfully withheld and now withholds the possession of the said tract of land from the said plaintiff, to the damage of the said plaintiff in the sum of ten dollars.

And said plaintiff further states that the rents and profits of the said tract of land are of the annual value of one hundred and fifty dollars.

Wherefore the said plaintiff prays judgment against the
3 said defendant that he, the said plaintiff, have and recover from the said defendant the possession of the said tract of land and the sum of ten dollars damages for the withholding thereof; and he prays judgment also against the said defendant for the value of the rents and profits of said land from the said first day of September, A. D. 1876, to the commencement of this action, and for such additional rents and profits as shall accrue during the pendency thereof, and for all such other or further relief to which the said plaintiff may be entitled and for costs of suit.

JOHN B. HALL,
Attorney for the Plaintiff.

(Duly verified.)
Filed December 6th, 1876.

JOHN WASLEY, *Clerk.*

Answer.

(Title of court and cause.)

Now comes the defendant in the above-entitled action, and for answer to the complaint in said action denies that the said plaintiff, on the first day of August, A. D. 1876, was the owner or ever since has been or is now the owner or entitled to the possession of the tract of land in the complaint described.

Denies that on or about the first day of September, A. D.
4 1876, or at any other time, he ousted the plaintiff from the possession of said tract of land, or thence hitherto has unlawfully withheld or now unlawfully withholds possession thereof from said plaintiff.

Denies that said plaintiff has sustained damages by said alleged withholding in the sum of ten dollars or in any sum whatever.

And for further answer said defendant avers and shows that he is the head of a family and a native-born citizen of the United States, over the age of twenty-one years; that he has never settled on or claimed any land as a pre-emptor under the pre-emption laws of the United States other than the land mentioned and described in this action.

That on the 25th day of April, A. D. 1876, and for the purpose of acquiring a right thereto under and by virtue of said pre-emption laws, and as a pre-emptor, he in good faith made a settlement in person on said land, and has had a dwelling-house thereon in which he has, and his family, ever since resided and made their home, and ever since such settlement has inhabited said tract of land and cultivated and improved the same, claiming the same as a pre-emption right under the said pre-emption laws.

That on the 24th day of July, A. D. 1876, said defendant presented to the register of the United States land office, Stockton

land district, California, within which land district said land
5 then was and still is situate, his written declaratory statement, signed by him, describing said land so settled on and the time of settlement thereon, and declaring his intention to claim said land as a pre-emption right under the provisions of the pre-emption laws of the United States.

That the register of said land office, upon said application being presented as aforesaid, rejected the same by endorsement in writing thereon, "for the reason that the official plat on file in said land office shows said land to have been returned as subject to periodical overflow."

That from said order rejecting said application as aforesaid said defendant appealed to the Commissioner of the General Land Office of the United States; and the Commissioner, on the 5th day of September, A. D. 1876, instructed said register that the land in question was claimed by the State of California under the first section of the act of Congress of July 23d, 1866, as having been sold in good faith as swamp land prior to the date, and directed said register to hold an investigation, after giving notice to the State authorities and this defendant and all other parties in interest, to determine said claim of said State.

That thereafterwards, to wit, on the 21st day of November, A. D. 1876, this defendant, the State of California, and the said plaintiff
6 appeared before the register and receiver of said land office, and after a full hearing of the case, under said instructions of said Commissioner, the said register and receiver, on the 8th day of February, A. D. 1877, declared against the claim of the State of California to the land in question on the ground that the State of California had made no selection of said land prior to the passage of the act of Congress of July 23, 1866, entitled "An act to quiet land titles in the State of California."

And defendant further avers and shows that at the time of his said settlement said land was surveyed public lands of the United States, subject to pre-emption under said pre-emption laws and subject to this defendant's said pre-emption claim and right thereto; that at the time of said settlement he was not nor never has been the owner of 320 acres of land; that he settled upon and has improved said land in good faith to appropriate it to his own exclusive use and benefit and not to sell the same on speculation, and he has never, directly or indirectly, made any agreement or contract in any way or manner by which the title which he might acquire from the Government of the United States to said land should inure in whole or in part to the benefit of any person except himself; that he did not quit nor abandon any residence on his own land to settle on said land.

That said land has never been reserved for any purpose whatever,
7 and contains no known mines or salines, and is not within the limits of any incorporated town, and has never been selected as the site of any city nor town, and has never been settled upon nor occupied for any purpose other than those of agriculture.

That at the time of said settlement no person was residing on said land and no person, other than this defendant, has resided or made his home thereon since defendant's said settlement.

That said defendant has in all respects, so far as he has been permitted to do so, fully complied with the pre-emption laws of the United States in respect to said land up to the present time, and is entitled to the possession thereof as against all comers except the Government of the United States; wherefore said defendant prays judgment for his costs.

W. L. DUDLEY,
Attorney for Defendant.

(Duly verified.)
Filed February 20th, 1877.

Per GEO. A. BROWN, *Deputy.*

Supplemental Answer.

In Superior Court, County of San Joaquin, State of California.

(Title of cause.)

Now comes defendant and, by leave of the court first had,
8 files this his supplemental answer herein, and in addition to the matters of defense set forth in the original answer herein said defendant alleges—

That since the commencement of this action, to wit, on the first day of June, 1882, the United States of America, by letters patent duly executed, gave, granted, and conveyed unto this defendant the whole of the land described in the complaint herein, to wit, the northwest quarter of section twenty-three, in township three (3) north, range seven (7) east, Mount Diablo meridian; which said letters patent are duly recorded in the office of the county recorder of San Joaquin county in volume four (4) of patents, at page 305, San Joaquin county records.

Wherefore defendant prays that plaintiff take nothing by this action and that defendant have judgment for his costs.

W. L. DUDLEY,
C. C. PAULK,
Attorneys for Defendant.

(Duly verified.)
Filed December 4, 1882.

H. W. WEAVER, *Clerk.*

Findings and Decision.

(Title of court and cause.)

The above-entitled action came on regularly for hearing and trial, the several parties appearing by their respective attor-
9 neys of record. A trial by jury having been expressly waived by the said attorneys, the said action was tried by the court, sitting without a jury; whereupon the evidence on behalf of the

respective parties was introduced and the cause was submitted to the court for consideration and decision.

The court now finds the following as the facts of the case:

I.

The United States subdivisional survey of township three (3) north of range seven (7) east, Mount Diablo base and meridian, was made by Deputy United States Surveyor John Wallace in the year 1865, and said survey, with the field-notes and plat thereof, were duly approved and the approval certified by the United States surveyor general for the State of California on the 23d day of August, A. D. 1865.

The said approved official plat of said survey was filed in the United States land office of the Stockton land district on the 18th day of October, A. D. 1865. A duly certified copy of the field and descriptive notes of the said survey was filed in the said Stockton office on or about June 17, A. D. 1881.

The land in suit is a part of said township three (3) and is within the limits of said Stockton land district.

II.

10 The said approved and certified plat upon its face exhibits a compact body of land consisting of the following sections and subdivisions of sections, to wit:

All of section number 23.
All of section number 26.
All of section number 33.
The south ½ and the northwest ¼ of section number 25.
The north ½ of section number 35.
The north ½ and the southwest ¼ of section number 34.
The south ½ and the northeast ¼ of section number 27.
The south ½ of section number 28.
The southeast ¼ of section number 32.

All that part of said plat which includes the foregoing sections and subdivisions of sections is colored blue (and by this color is distinguished from all other parts of the plat), and thereon is written the words "Land subject to periodical overflow."

Of the field-notes aforesaid are the following:

North between sections 22 and 23, var. 15° 24′ E.
Chains 6.20, middle of slough, 30 l'ks wide, course W.
Chains 18.20, middle of slough, 50 l'ks wide, course W.
11 Chains 30.50, middle of slough, 80 l'ks wide, course W.
Chains 39.27, fence, course E. and W.

Chains 40.00, set post for cor. to sections 14, 15, 22, and 23; land level and first rate, subject to overflow from slough.

East on a random line between sections 23 and 26, closing with cor. sections 22, 23, 26, 27; land level, first rate, subject to overflow.

North between sections 23, 24, var. 13° 24′.

Chains 40.00, set post for ¼ sec. cor. in mound, trench and pits.

Chains 41.20, middle of slough, 50 l'ks wide, course W.
Chains 78.20, middle of slough, 50 l'ks wide, course N. W.
Chains 80.00, set post for cor. to sections 13, 14, 23, 24.
Made mounds, dug pits; land level, first rate, subject to overflow from slough.

III.

That in and by the said descriptive and field notes the said body of land (colored blue and marked "land subject to periodical overflow") is represented to be subject to inundation by the overflow of the Calaveras river and its branches, and is thus rendered incapable of being cultivated for the raising of crops, except by means of banks and levees which have been erected to prevent the overflow of the water during the winter and spring months.

IV.

12 That in the month of April, 1865, one H. T. Hartwell made application, under and in accordance with the provisions of the act of the Legislature of California of April 27, 1863, concerning State lands, to purchase the said northwest quarter of section twenty-three (23) from the State as being swamp and overflowed land belonging to the State, and on the 28th day of said April the county surveyor, Smith, of the county of San Joaquin, wherein the said land lies, made a survey and recorded in his office a plat and field-notes thereof in accordance with the said act of the Legislature and the instructions of the State surveyor general.

It is shown by the said plat and field-notes of the county surveyor that the survey of the said northwest quarter was and is in accordance with the United States survey of said township, section, and quarter section, and that the said northwest quarter is thereon (the plat and field-notes of said county surveyor) described as swamp and overflowed land and containing 160 acres.

The county surveyor certified and reported to the State surveyor general the said plat and field-notes, and the same were received and filed in the office of the State surveyor general on the 22d day of October, A. D. 1865, and on the 23d day of November, A. D. 1865, the said survey and plat and field-notes thereof were duly approved of record by said State surveyor general.

13 V.

That in the month of April, 1869, the said Hartwell made application, under and in accordance with the provisions of the act of the Legislature of California of March 28, 1868, concerning State lands, to purchase the said northwest quarter of section twenty-three (23) from the State as being of the swamp and overflowed lands belonging to the State, and on the 28th day of April, 1869, the county surveyor, John Wallace, of the county of San Joaquin, made a survey and recorded in his office a plat and field-notes thereof in accordance with the said act of March 28, 1868, and the instructions of the State surveyor general.

It is shown by the said plat and field-notes of County Surveyor Wallace that his survey of the said northwest quarter was and is in accordance with the United States survey of said township, section, and quarter section, and the said northwest quarter is thereon (the plat and field-notes of said County Surveyor Wallace) described as swamp and overflowed land and containing 160 acres.

Said County Surveyor Wallace certified and reported to the State surveyor general the said plat and field-notes and the same were received and filed in the office of the State surveyor general on the 4th day of May, A. D. 1869, and the said survey and the plat
14 and field-notes thereof were duly approved of record by the said State surveyor general on the 12th day of November, A. D. 1869.

VI.

On the 19th day of April, 1870, the State of California issued and delivered to the said Hartwell a certificate of purchase of and for the land in suit founded upon the said last-named application and approved survey.

This certificate sets forth that Hartwell had made part payment of the purchase price and was the purchaser of the land, and that on making full payment and surrendering the certificate he should receive the patent of the State for the same.

On the 1st day of April, 1871, this certificate was sold and assigned, in writing, and delivered by Hartwell to the plaintiff, T. P. Heath.

VII.

That on the 21st day of July, A. D. 1876, a patent was issued and delivered by the State to said Heath, as assignee of the certificate for the said land in suit.

This patent is signed, attested, and countersigned by the Governor, secretary of state, and register of the State land office, with the seal of the State thereto affixed, and it sets forth that the land is swamp and overflowed and had been duly and properly surveyed in
15 accordance with law; that full payment had been made to the State for the land; that all the requirements of the act of Congress, as well as the acts of the State Legislature, in relation to swamp and overflowed lands had been complied with, and that the Governor of the State, by virtue of authority in him vested, thereby granted, bargained, sold, and conveyed unto T. P. Heath, his heirs and assigns, forever the said tract of land, with the appurtenances thereto belonging.

VIII.

That on the 10th day of January, A. D. 1866, the said Hartwell filed in the said land office at Stockton a pre-emptor's declaratory statement for the said northwest quarter of section 23, alleging settlement thereon September 20, 1862, and on the 29th day of October, A. D.

1873, the said Hartwell filed in said office a written abandonment of said pre-emption claim and filing.

On the 8th day of December, A. D. 1873, the said declaratory statement was cancelled on the records of said land office by order of the Commissioner of the General Land Office of the United States.

IX.

That the land in suit (N. W. ¼ of section 23, t'w'p 3 north, range 7 east, M. D. M.) has always been within the boundaries and has formed a part of the United States land district called the Stockton land district.

16 Except the said declaratory statement of the said Hartwell of January 10, 1866, no claim, filing, or entry to or upon the said land in suit for pre-emption, homestead, or other purposes under the laws of the United States was presented or made of record until the 24th day of July, 1876.

X.

That on the 24th day of July, 1876, the defendant, M. T. Wallace, presented to United States Register Cottle, at the Stockton land office, an instrument, partly in writing and partly printed, called a declaratory statement, with the name of said Wallace thereto subscribed. This statement set forth that said Wallace was a native citizen of the United States and a married man over the age of twenty-one years, and that on the 25th day of April, 1876, he settled and improved the said northwest quarter of section 23, and that he intended to claim said tract of land as a pre-emption right under the provisions of the act of Congress approved September 4th, 1841, and under the act approved March 3d, 1853, entitled "An act to provide for the survey of public lands in California, granting of pre-emption rights therein, and for other purposes."

That said Register Cottle received the said statement, but refused to file the same, and thereon endorsed that he rejected the

17 said written application for the reason that the official plat on file in his office showed said land to have been returned as subject to periodical overflow.

XI.

That the said Wallace appealed from the said decision of the Stockton land register to the Commissioner of the General Land Office, and on the 5th day of September, 1876, the register and receiver of the Stockton land office were, by a letter of the Commissioner, informed that the N. W. ¼ of sec. 23 is claimed by the State under the first section of the act of July 23, 1866, as having been sold in good faith as swamp land prior to that date and directing the said officers to give notice to the State authorities, to the said Wallace, and all other parties in interest, and hold an investigation to determine said claim of the State.

XII.

That on the 8th day of February, 1877, the register and receiver, after having held the said investigation, decided that the State had no valid claim to said land under the first section of the said act of July 23, 1866; which said decision was subsequently, to wit, on the 19th day of May, 1877, affirmed by the Commissioner.

XIII.

That in and by the same decision of the Commissioner of May 19th, 1877, it was adjudged and determined that the State
18 was not entitled to show the character of the said land as swamp and overflowed under the 4th clause of the 4th section of the said act of July 23, 1866.

That the State took an appeal from the last aforesaid judgment of the Commissioner to the Secretary of the Interior, who, on the 28th day of December, 1877, overruled the Commissioner in this behalf and directed a hearing to be given to the State on the question of the character of the land by virtue of the said 4th clause of the 4th section.

XIV.

That pursuant to said order of the Secretary and after notice to the State and all parties in interest the United States surveyor general held an investigation as to the character of the land, and thereafter it was decided by the said surveyor general that the land was not in fact swamp and overflowed land on the 28th day of September, 1850, and thereafter said decision was affirmed by the Secretary of the Interior on the 25th day of February, 1881, and it was further then adjudged by the Secretary that the said tract was subject to disposal under the pre-emption laws, and that Wallace be allowed to perfect his pre-emption claim thereto by entry and patent.

XV.

That after the last stated decision of the Secretary of the
19 Interior, to wit, on or about the month of November, 1881, the said Wallace filed his declaratory statement and made proof and payment for said tract under the pre-emption laws.

XVI.

That in the month of June, 1882, a patent of the United States founded on the said entry was issued and delivered to the said Wallace for the said tract.

XVII.

That after the issuance of the patent to said Wallace the State of California applied to the Land Department of the United States,

claiming that the State was entitled in respect to said tract to the benefit of the first and second clauses of section four (4) of the said act of July 23, 1866, and the provisions also of section 2479 and the first and second clauses of section 2488 of the Revised Statutes of the United States, and that said land be accordingly certified over to the State because the said land, before the act of July 23, 1866, had been segregated and represented by the township survey, field-notes, and plat of the United States as swamp and overflowed, and had been segregated also by the State as swamp and overflowed by several surveys—conforming to the United States system of surveys—made before the passage of the said act of July 23, 1866, and of said provisions of the Revised Statutes, and before the settlement of said Wallace.

20 XVIII.

That on the 26th day of April, 1883, the Commissioner of the General Land Office refused to consider the said application and dismissed the same on the sole ground that, the patent of the United States having already issued for the said tract to said Wallace, the Department had no authority or jurisdiction of the subject of said application of the State, and March 3, 1884, the Secretary of the Interior affirmed this decision of the Commissioner upon the same ground and no other.

XIX.

The plaintiff was not the owner of the tract of land in suit on the first day of September, A. D. 1876, and was not entitled to the possession thereof, and was not the owner or so entitled when this action was commenced.

XX.

The defendant was in the possession of the land in suit on the first day of September, 1876, and when this action was commenced withheld the possession from the plaintiff.

XXI.

That the rents and profits of the said land in suit are of the annual value of one hundred and fifty dollars.

21 XXII.

There is no record in the United States land office at Stockton or elsewhere showing any selection of said land by the State of California or any of its officers prior to July 23, 1866, except so far as such selection may be shown by the facts hereinbefore found; nor is there any record showing that there was any certification of this land as swamp and overflowed land ever made to the State of California.

And as a conclusion of law from the foregoing facts the court

finds that the defendant is entitled to judgment, and it is so ordered.

A. VAN R. PATERSON,
Judge of Superior Court.

December 21, 1885.

Endorsed: Filed Dec. 23, 1885. C. W. Yolland, clerk, by A. R. Bogue, deputy.

Judgment.

(Title of court and cause.)

This cause came on regularly for trial on the 20th day of July, 1884, John B. Hall, Esq., appearing as counsel for plaintiff, and W. L. Dudley, Esq., for the defendant.

22 A trial by jury having been expressly waived by the respective parties, the cause was tried before the court without a jury; whereupon witnesses on the part of plaintiff and defendant were sworn and examined and documentary evidence introduced by the respective parties; and, the evidence being closed, the cause was thereupon argued by the respective counsel and submitted to the court for consideration and decree, and after due deliberation the court files its findings and decision in writing and orders that judgment be entered herein in favor of defendant in accordance therewith.

Wherefore, by reason of the law and findings aforesaid, it is ordered, adjudged, and decreed that T. C. Heath, the plaintiff, take nothing by reason of this action, and that the defendant, M. T. Wallace, do have and recover of and from T. P. Heath, the plaintiff herein, said defendant's costs and disbursements incurred in this action, amounting to the sum of $241.00.

Dated Dec. 23, 1885.

Notice of Appeal.

(Title of court and cause.)

To the clerk of the said court and to the said defendant and W. L. Dudley, Esq., his attorney:

You are hereby notified that the said plaintiff takes an appeal to the supreme court of California from the judgment of the

23 said superior court in the above-entitled action entered herein on the 23d day of December, A. D. 1885, against the said plaintiff and in favor of the said defendant, to the effect that said plaintiff take nothing by his action, and that defendant recover from the said plaintiff the said defendant's costs of suit, taxed at two hundred and forty-one dollars, and from every part of said judgment.

January 9th, 1886.

J. B. HALL,
Attorney for the Plaintiff.

Received, Stockton, January 9th, A. D. 1886, a copy of the foregoing notice of appeal.

W. L. DUDLEY,
Attorney for the Defendant.

Filed January 9, 1886.

C. W. YOLLAND, *Clerk.*

Certificate and Stipulation of Attorneys.

(Title of court and cause.)

It is hereby stipulated and certified that the foregoing printed transcript contains a full and correct copy of each of the following papers on file and of record herein with the clerk of said superior court, and of the several indorsements, namely, complaint, answer, supplemental answer, findings and decisions of the court,
24 judgment, and notice of appeal; that said papers shall constitute the record on appeal, and that an undertaking on appeal in due time and form has been properly filed herein.

Dated this 16 day of February, A. D. 1886.

JOHN B. HALL,
Attorney for Plaintiff and Appellant.
W. L. DUDLEY,
Attorney for Defendant and Respondent.

25 Due service of the within transcript and receipt of a copy thereof acknowledged this sixteenth day of February, 1886, the appellant requesting respondent's certificate to the correctness thereof.

W. L. DUDLEY,
Attorney for Defendant and Respondent.

I hereby certify that a copy of the within transcript was deposited with me this 16th day of February, 1886, to be delivered to the judge who presided at the trial of said cause in the superior court.

C. W. YOLLAND, *Clerk,*
By A. R. BOGUE, *Deputy.*

26 *Submission of Cause.*

In the Supreme Court of the State of California.

HEATH
v.
WALLACE. } 11492.

1886, May 5.—Ordered appellant be allowed 20 days to file brief; respondent 20 days to reply; appellant 10 days to reply thereto; cause to be thereon submitted.

(Title court and cause.)

1886, June 26.—Cause ordered submitted.

(Title court and cause.)

1886, Oct. 11.—Filed petition for rehearing.

(Title court and cause.)

1886, Oct. 22.—Rehearing denied.

THE COURT.

27 In the Supreme Court of the State of California, Department Two.

T. P. HEATH, Appellant, *vs.* M. T. WALLACE, Respondent. } No. 11492. On Appeal from the Superior Court in and for the County of San Joaquin.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Thornton, J. We concur: McKee, J.; Sharpstein, J. Whereupon it is adjudged and decreed by the court that the judgment of the superior court in and for the county of San Joaquin in the above-entitled cause be, and the same is hereby, affirmed.

[Endorsed:] No. —. In the supreme court, State of California. Remittitur. —— —— *vs.* —— ——. Clerk's costs, $—; paid by appellant, $—; paid by respondent, $—; total, $—. —— ——, clerk, by —— ——, deputy.

28 *Opinion.*

Department Two.

(Filed September 22, 1886.)

HEATH *vs.* WALLACE. } No. 11492.

This is an action to recover possession of the northwest quarter of section 23, in township 3 N., range 7 E., Mount Diablo meridian. Judgment was rendered for the defendant, from which plaintiff appealed to this court.

The questions to be decided here arise on the findings of fact, which are here inserted, and are as follows:

"I. The United States subdivisional survey of township three (3) N. of range seven (7) E., Mount Diablo base and meridian, was made by Deputy United States Surveyor John Wallace in the year 1865, and said survey, with the field-notes and plat thereof, were duly approved and the approval certified by the United States surveyor general for the State of California on the 23d day of August, A. D. 1865.

The said approved official plat of said survey was filed in the United States land office of the Stockton land district on the 18th

day of October, A. D. 1865. A duly certified copy of the field and descriptive notes of the said survey was filed in the said Stockton office on or about June 17, A. D. 1881.

The land in suit is a part of said township three (3) and is within the limits of said Stockton land district.

II. The said approved and certified plat upon its face exhibits a compact body of land consisting of the following sections and subdivisions of sections, to wit:

All of section number 23.
All of section number 26.
All of section number 33.
The south ½ and the northwest ¼ of section number 25.
The north ½ of section number 35.
The north ½ and the southwest ¼ of section number 34.
The south ½ and the northeast ¼ of section number 27.
The south ½ of section number 28.
The southeast ¼ of section number 32.

All that part of said plat which includes the foregoing sections and subdivisions of sections is colored blue (and by this color is distinguished from all other parts of the plat), and thereon is written the words "Land subject to periodical overflow."

Of the field-notes aforesaid are the following:

North between sections 22 and 23, var. 15° 24′ E.
Chains 6.20, middle of slough, 30 links wide, course W.
Chains 18.20, middle of slough, 50 links wide, course W.
Chains 30.50, middle of slough, 80 links wide, course W.
Chains 39.27, fence, course E. and W.
Chains 40, set post for corner to sections 14, 15, 22, and 23; land level and first rate, subject to overflow from slough.
East on a random line between sections 23 and 26, closing with corner sections 22, 23, 26, 27; land level, first rate, subject to overflow.
North between sections 23, 24, var. 13° 24′.
Chains 40, set post for ¼ section corner in mound, trench and pits.
Chains 41.20, middle of slough, 50 links wide, course W.
Chains 78.20, middle of slough, 50 links wide, course N. W.
Chains 80, set post for corner to sections 13, 14, 23, 24.
Made mounds, dug pits; land level, first rate, subject to overflow from slough.

III. That in and by the said descriptive and field notes the said body of land (colored blue and marked "land subject to periodical overflow") is represented to be subject to inundation by the overflow of the Calaveras river and its branches, and is thus rendered incapable of being cultivated for the raising of crops, except by means of banks and levees which have been erected to prevent the overflow of the water during the winter and spring months.

IV. That in the month of April, 1865, one H. T. Hartwell made application, under and in accordance with the provisions of the act of the Legislature of California of April 27, 1863, concerning State lands, to purchase the said northwest quarter of section twenty-three (23) from the State as being swamp and overflowed land be-

longing to the State, and on the 28th day of said April the county surveyor, Smith, of the county of San Joaquin, wherein the said land lies, made a survey and recorded in his office a plat and field-notes thereof in accordance with the said act of the Legislature and the instructions of the State surveyor general.

It is shown by the said plat and field-notes of the county surveyor that the survey of the said northwest quarter was and is in accordance with the United States survey of said township, section, and quarter section, and that the said northwest quarter is thereon (the plat and field-notes of said county surveyor) described as swamp and overflowed land and containing 160 acres.

The county surveyor certified and reported to the State surveyor general the said plat and field-notes, and the same were received and filed in the office of the State surveyor general on the 22d day of October, A. D. 1865, and on the 23d day of November, A. D. 1865, the said survey and plat and field-notes thereof were duly approved of record by said State surveyor general.

V. That in the month of April, 1869, the said Hartwell made application, under and in accordance with the provisions of the act of the Legislature of California of March 28, 1868, concerning State lands, to purchase the said northwest quarter of section twenty-three (23) from the State as being of the swamp and overflowed lands belonging to the State, and on the 28th day of April, 1869, the county surveyor, John Wallace, of the county of San Joaquin, made a survey and recorded in his office a plat and field-notes thereof in accordance with the said act of March 28, 1868, and the instructions of the State surveyor general.

It is shown by the said plat and field-notes of County Surveyor Wallace that his survey of the said northwest quarter was and is in accordance with the United States survey of said township, section, and quarter section, and the said northwest quarter is thereon (the plat and field-notes of said County Surveyor Wallace) described as swamp and overflowed land and containing 160 acres.

Said County Surveyor Wallace certified and reported to the State surveyor general the said plat and field-notes and the same were received and filed in the office of the State surveyor general on the 4th day of May, A. D. 1869, and the said survey and the plat and field-notes thereof were duly approved of record by the said State surveyor general on the 12th day of November, A. D. 1869.

VI. On the 19th day of April, 1870, the State of California issued and delivered to the said Hartwell a certificate of purchase of and for the land in suit founded upon the said last-named application and approved survey.

This certificate sets forth that Hartwell had made part payment of the purchase price and was the purchaser of the land, and that on making full payment and surrendering the certificate he should receive the patent of the State for the same.

On the 1st day of April, 1871, this certificate was sold and assigned, in writing, and delivered by Hartwell to the plaintiff, T. P. Heath.

VII. That on the 21st day of July, A. D. 1876, a patent was issued and delivered by the State to said Heath, as assignee of the certificate for the said land in suit.

This patent is signed, attested, and countersigned by the Governor, secretary of state, and register of the State land office, with the seal of the State thereto affixed, and it sets forth that the land is swamp and overflowed and had been duly and properly surveyed in accordance with law; that full payment had been made to the State for the land; that all the requirements of the act of Congress, as well as the acts of the State Legislature, in relation to swamp and overflowed lands had been complied with, and that the Governor of the State, by virtue of authority in him vested, thereby granted, bargained, sold, and conveyed unto T. P. Heath, his heirs and assigns, forever the said tract of land, with the appurtenances thereto belonging.

VIII. That on the 10th of January, A. D. 1866, the said Hartwell filed in the said land office at Stockton a pre-emptor's declaratory statement for the said northwest quarter of section 23, alleging settlement thereon September 20, 1862, and on the 29th day of October, A. D. 1873, the said Hartwell filed in said office a written abandonment of said pre-emption claim and filing.

On the 8th day of December, A. D. 1873, the said declaratory statement was cancelled on the records of said land office by order of the Commissioner of the General Land Office of the United States.

IX. That the land in suit (N. W. ¼ of section 23, township 3 N., range 7 E., M. D. M.) has always been within the boundaries and has formed a part of the United States land district called the Stockton land district.

Except the said declaratory statement of the said Hartwell of January 10, 1866, no claim, filing, or entry to or upon the said land in suit for pre-emption, homestead, or other purposes under the laws of the United States was presented or made of record until the 24th day of July, 1876.

That on the 24th day of July, 1876, the defendant, M. T. Wallace, presented to United States Register Cottle, at the Stockton land office, an instrument, partly in writing and partly printed, called a declaratory statement, with the name of said Wallace thereto subscribed.

This statement set forth that said Wallace was a native citizen of the United States and a married man over the age of twenty-one years, and that on the 25th day of April, 1876, he settled and improved the said northwest quarter of section 23, and that he intended to claim said tract of land as a pre-emption right under the provisions of the act of Congress approved September 4, 1841, and under the act approved March 3, 1853, entitled "An act to provide for the survey of public lands in California, granting of pre-emption rights therein, and for other purposes."

That said Register Cottle received the said statement, but refused to file the same, and thereon endorsed that he rejected the said written application for the reason that the official plat on file in his

office showed said land to have been returned as subject to periodical overflow.

29 XI. That the said Wallace appealed from the said decision of the Stockton land register to the Commissioner of the General Land Office, and on the fifth day of September, 1876, the register and receiver of the Stockton land office were, by a letter of the Commissioner, informed that the northwest quarter of section 23 is claimed by the State under the first section of the act of July 23, 1866, as having been sold in good faith as swamp land prior to that date and directing the said officers to give notice to the State authorities, to the said Wallace, and all other parties in interest, and hold an investigation to determine said claim of the State.

XII. That on the eighth day of February, 1877, the register and receiver, after having held the said investigation, decided that the State had no valid claim to said land under the first section of the said act of July 23, 1866; which said decision was subsequently, to wit, on the nineteenth day of May, 1877, affirmed by the Commissioner.

XIII. That in and by the same decision of the Commissioner of May 19, 1877, it was adjudged and determined that the State was not entitled to show the character of the said land as swamp and overflowed under the fourth clause of the fourth section of the said act of July 23, 1866.

That the State took an appeal from the last aforesaid judgment of the Commissioner to the Secretary of the Interior, who, on the twenty-eighth day of December, 1877, overruled the Commissioner in this behalf and directed a hearing to be given to the State on the question of the character of the land by virtue of the said fourth clause of the fourth section.

XIV. That pursuant to said order of the Secretary and after notice to the State and all parties in interest the United States surveyor general held an investigation as to the character of the land, and thereafter it was decided by the said surveyor general that the land was not in fact swamp and overflowed land on the twenty-eighth day of September, 1850, and thereafter said decision was affirmed by the Secretary of the Interior on the twenty-fifth day of February, 1881, and it was further then adjudged by the Secretary that the said tract was subject to disposal under the pre-emption laws, and that Wallace be allowed to perfect his pre-emption claim thereto by entry and patent.

XV. That after the last stated decision of the Secretary of the Interior, to wit, on or about the month of November, 1881, the said Wallace filed his declaratory statement and made proof and payment for said tract under the pre-emption laws.

XVI. That in the month of June, 1882, a patent of the United States founded on the said entry was issued and delivered to the said Wallace for the said tract.

XVII. That after the issuance of the patent to said Wallace the State of California applied to the Land Department of the United States claiming that the State was entitled in respect to said tract to the benefit of the first and second clauses of section four (4) of the said act of July 23, 1866, and the provisions also of section 2479 and the

first and second clauses of section 2488 of the Revised Statutes of the United States, and that said land be accordingly certified over to the State because the said land, before the act of July 23, 1866, had been segregated and represented by the township survey, field-notes, and plat of the United States as swamp and overflowed, and had been segregated also by the State as swamp and overflowed by several surveys—conforming to the United States system of surveys—made before the passage of said act of July 23, 1866, and of said provisions of the Revised Statutes, and before the settlement of said Wallace.

XVIII. That on the 26th day of April, 1883, the Commissioner of the General Land Office refused to consider the said application and dismissed the same on the sole ground that, the patent of the United States having already issued for the said tract to said Wallace, the Department had no authority or jurisdiction of the subject of said application of the State, and March 3, 1884, the Secretary of the Interior affirmed this decision of the Commissioner upon the same ground and no other.

XIX. The plaintiff was not the owner of the tract of land in suit on the 1st day of September, A. D. 1876, and was not entitled to the possession thereof, and was not the owner or so entitled when this action was commenced.

XX. The defendant was in the possession of the land in suit on the 1st day of September, 1876, and when this action was commenced withheld the possession from the plaintiff.

XXI. That the rents and profits of the said land in suit are of the annual value of $150.

XXII. There is no record in the United States land office at Stockton or elsewhere showing any selection of said land by the State of California or any of its officers prior to July 23, 1866, except so far as such selection may be shown by the facts hereinbefore found; nor is there any record showing that there was any certification of this land as swamp and overflowed land ever made to the State of California.

And as a conclusion of law from the foregoing facts the court finds that the defendant is entitled to judgment, and it is so ordered."

It is contended on behalf of plaintiff that he is entitled to recover the land in suit under the first clause of section 4 of the act of Congress of July 22, 1866, entitled "An act to quiet land titles in California." (Sec. 14 U. S. Stats. at Large, p. 219.) The clause just referred to is as follows:

"That in all cases where township surveys have been or shall hereafter be made under authority of the United States, and the plats thereof approved, it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California, as swamp and overflowed, all the lands represented as such, upon such approved plats, within one year from the passage of this act or within one year from the return and approval of such township plats."

It is urged that the township survey having been made in this

case and the plat approved before the act of July 23, 1866, was passed, on which approved plat the land in controversy was represented as swamp and overflowed, it then became the duty of the Commissioner of the General Land Office under this clause of the 4th section to certify such land over to the State of California as swamp and overflowed within one year after the passage of the act aforesaid, and that, as such duty was a merely ministerial one on the part of the Commissioner, the above-mentioned portion of the act was in effect a confirmation to the State of the land in controversy; that thus the title vested in the State and passed to the plaintiff claiming under the State.

Conceding that such would be the consequence had the land in suit been represented as swamp and overflowed on the approved plat of the township survey, we are of opinion that the land is not so represented on the plat. The finding is that the land is designated thereon as "subject to periodical overflow." We cannot say that the words used, "land subject to periodical overflow," are the same in meaning as "swamp and overflowed land" or that they are intended to designate land as swamp and overflowed. So holding we cannot sustain the above contention of plaintiff. We hold the same as to first clause of section 2488 of the United States Revised Statutes, which is substantially a re-enactment of the first clause of the fourth section of the act of 1866.

It is further contended on behalf of plaintiff that as the land in controversy had been surveyed upon the application to purchase made by Hartwell, the assignor of plaintiff, by the county surveyor of the county of San Joaquin, that the surveyor made a plat and field-notes of the northwest quarter in suit in accordance with the United States survey of the township, section, and quarter section, described the same as swamp and overflowed and containing 160 acres, returned such plat and field-notes to the State surveyor general, who received and filed the same in his office on the 22d of October, 1865, and approved them on the 23d of November, 1865; that by virtue of the second clause of the fourth section of the act of 1866, above cited, and the second clause of section 2488 of the U. S. Rev. Stats., the title has passed to the State, and through it to the plaintiff.

The second clause of section 4 referred to is as follows:

"The Commissioner shall direct the United States surveyor general for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by the State, and when he shall find them to conform to the system of surveys adopted by the United States he shall construct and approve township plats accordingly and forward them to the General Land Office for approval."

The second clause of section 2488 of the Revised Statutes is substantially the same.

We are of opinion that the surveys and plats made, as in this case, under the acts of 1863 and 1868, on the application of a party desiring to purchase the tract sought to be purchased, are not the segregation maps and surveys referred to in the act of Congress of July

23, 1866, and the section of the Revised Statutes above referred to.

Granting the survey and plat made on the application of Hartwell to purchase a specific tract of land (the northwest quarter in controversy) was a segregation map and survey, such as is embraced within the above-quoted clause from the act of 1866, it does not appear that the Commissioner gave any direction to the United States surveyor general for this State, as required by the act, or that if such order was given it was complied with, or that any township plat was made under this order or, if made, that it was approved at the General Land Office.

Such being the case, we cannot hold that any title has vested in the State under the clauses just above referred to of the act of 1866 and section 2488 of the Revised Statutes.

It would be going far to hold that the land in controversy was ever in any manner recognized by the Land Department at Washington as swamp and overflowed land, when it appears from the findings that in a controversy wherein the parties herein, including the State, were notified and were heard or had an opportunity to be heard, it was decided by the United States surveyor general for California that the land in suit was not swamp and overflowed, which decision was afterwards affirmed by the Secretary of the Interior. This decision was made, as appears from the findings, upon a trial had by order of the Secretary of the Interior, in which the question to be determined was whether or not the land in controversy was swamp and overflowed, and was ordered to be had under the last clause of section 4 of the act of July 23, 1866.

The foregoing disposes of all the material points discussed by the counsel for appellant.

There is no error and the judgment is affirmed.

THORNTON, *J.*

We concur:

McKEE, *J.*

SHARPSTEIN, *J.*

30 In the Supreme Court of the United States.

T. P. HEATH, Plaintiff in Error,
v.
M. T. WALLACE, Respondent in Error.

Know all men by these presents that we, J. B. Boody and H. S. Sargent, of San Joaquin county, in the State of California, are held and firmly bound unto M. T. Wallace, the above-named defendant in error, in the sum of five hundred dollars ($500.00), to be paid to the said Wallace, his certain attorney, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 29th day of August, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas in a cause depending in the supreme court of the
31 State of California between the said T. P. Heath, as appellant, and said M. T. Wallace, as respondent (numbered 11492), a judgment was rendered by the said supreme court of California by department two of that court on the 22d day of September, A. D. 1886, affirming with costs the judgment of the superior court from which the said Heath had appealed in favor of the said Wallace and against the said Heath; and whereas the said Heath is about to prosecute in the Supreme Court of the United States a writ of error therefrom to the said supreme court of the State of California, to the end that said judgment of affirmance may be reviewed:

Now, the condition of the above obligation is such that if the said Heath, plaintiff in the said writ of error, shall prosecute said writ to effect and answer all damages and costs if said plaintiff in error fail to make his plea good, then the above obligation to
32 be void; else to remain in full force and virtue.

J. B. BOODY. [L. S.]
H. S. SARGENT. [L. S.]

Signed and sealed in the presence of—
W. B. MITTER.

STATE OF CALIFORNIA, }
County of San Joaquin, } ss:

J. B. Boody and H. S. Sargent, being first duly sworn, depose and say and each for himself saith that he is a freeholder and resides in the county of San Joaquin, in the State of California; that he is worth the sum of five hundred dollars over and above all just debts and liabilities, exclusive of property exempt from execution.

J. B. BOODY.
H. S. SARGENT.

Sworn to and subscribed before me this 29th day of August, A. D. 1888.

[NOTARIAL SEAL.] W. B. MITTER,
Notary Public, San Joaquin County, State of California.

[Endorsed:] 11492. In the Supreme Court of the United States. T. P. Heath, pl'ff in error, *vs.* M. T. Wallace, def't in error. Bond in error. The within bond is approved this 31st day of August, 1888. Niles Searls, chief justice supreme court, State of California.

Endorsed: Filed Aug. 31, 1888. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

33 In the Supreme Court of the United States.

T. P. HEATH, Plaintiff in Error, }
vs. } Citation.
M. T. WALLACE, Defendant in Error. }

The United States of America to M. T. Wallace, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C.,

on the second Monday of October, A. D. 1888, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein T. P. Heath is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Niles Searls, chief justice of the supreme court of California, this thirty-first day of August, in the year of our Lord one thousand eight hundred and eighty-eight.

NILES SEARLS,
Chief Justice Supreme Court, State of California.

33½ Due service of the within citation is hereby admitted this 3rd day of September, A. D. 1888.

W. L. DUDLEY,
Attorney for Defendant in Error.

[Endorsed:] In the Supreme Court of the United States. T. P. Heath, plaintiff in error, *vs.* M. T. Wallace, defendant in error. Citation.

Endorsed: Filed Sept. 7, 1888. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

34 OFFICE OF THE SHERIFF OF THE COUNTY OF SAN JOAQUIN, STATE OF CALIFORNIA.

I do hereby certify that I received the hereto-annexed citation on the 3rd day of September, A. D. 1888, and personally served the same upon M. T. Wallace, the person named therein, by showing and reading to the said M. T. Wallace personally, in the county of San Joaquin, on the 5th day of September, A. D. 1888, the annexed original citation and at the same time delivering to him personally a copy of said citation.

THOS. CUNNINGHAM,
Sheriff of San Joaquin County, Cal.
WILLIAM CRANDALL,
Deputy Sheriff.

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of a judgment of a plea which is in the said supreme court, before you, between T. P. Heath, plaintiff and plaintiff in error, and M. T. Wallace, defendant and defendant in error, a manifest error hath happened, to the great damage of the said plaintiff and plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Su-

preme Court, at the city of Washington, in the District of Columbia, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court to be there and then held, that, the record and proceedings aforesaid beinspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal U. S. Circuit Court, Northern Dist., Cal.

Witness the Hon. Samuel F. Miller, senior associate justice of the Supreme Court of the United States, this 31st day of August, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and 113th.

L. S. B. SAWYER,
Clerk of the Circuit Court of the United States of the Ninth Judicial Circuit in and for the Northern District of California.

The above writ of error is hereby allowed.

NILES SEARLS,
Chief Justice Supreme Court, State of California.

[Endorsed:] 11492. United States Supreme Court. T. P. Heath, pl'ff & pl'ff in error, *vs.* M. T. Wallace, def't & def't in error. Writ of error. Filed Aug. 31, 1888. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

36 *Clerk's Certificate.*

In the Supreme Court of the State of California.

T. P. HEATH, Pl'ff in Error,
v.
M. T. WALLACE, Def't in Error.

I, J. D. Spencer, clerk of the supreme court of the State of California, do hereby certify that the foregoing thirty-five pages, numbered from one to thirty-five, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said supreme court this 7th day of September, 1888.

[Seal Supreme Court of California.]

J. D. SPENCER, *Clerk*,
By BEN. M. MADDOX, *Deputy*.

Endorsed on cover: California supreme court. No. 854. T. P. Heath, plaintiff in error, *vs.* M. T. Wallace. Filed October 8, 1888.

Office Supreme Court U. S.
FILED,
JAN 8 1891
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

T. P. HEATH,
PLAINTIFF IN ERROR,
v.
M. T. WALLACE.

No. 528.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR PLAINTIFF IN ERROR.

A. T. BRITTON,
A. B. BROWNE,
Att'ys for Plaintiff in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1890.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

T. P. HEATH,
PLAINTIFF IN ERROR,
v.
M. T. WALLACE.

No. 528.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief for Plaintiff in Error.

STATEMENT.

This was an action of ejectment brought by the plaintiff in error to recover from defendant in error the possession of the northwest quarter of section twenty-three (23) in township three (3) north, of range seven (7) east, Mt. Diablo Meridian, in the County of San Joaquin, and State of California. A jury having been expressly waived, upon the findings of fact and of law by the District Court of the Fifth Judicial District of the State of California, judgment was entered in favor of the defendant. This judgment was upon appeal affirmed by the Supreme Court of

the State, and this writ of error is to correct alleged errors therein.

The record facts are substantially—

FIRST. The United States subdivisional survey of the township in question was made in the year 1865, and said survey, with the field-notes and plat thereof, were duly approved, and the approval certified by the U. S. Surveyor-General for California, on August 23, 1865. Said approved plat was filed in the Stockton Land Office October 18, 1865, and a duly certified copy of the field and descriptive notes of the said survey were filed in the same Land Office on or about June 17, 1881. (Finding I, Record, p. 5.)

SECOND. A large and compact body of land (including the entire section 23), and touching the east and south lines of the township, was distinguished upon the plat from the remainder of the township by being colored blue, and over this colored part were written the words—

"Land subject to periodical overflow."

This colored tract was traversed by sloughs or branches of the Calaveras River, and it was represented by the aforesaid description and field-notes "to be subject to "inundation by the overflow of the Calaveras River and "its branches, and is thus rendered incapable of being "cultivated for the raising of crops, except by means of "banks and levees which have been erected to prevent "the overflow of the water during the winter and spring "months." (Findings II, III, Record, pp. 5 and 6.)

THIRD. In April, 1865, H. T. Hartwell, under the provisions of the act of the Legislature of California approved April 27, 1863, applied to purchase from the State the quarter section here in controversy as being

swamp and overflowed land inuring to the State under the act of Congress approved September 28, 1850, and on April 28, 1865, the County Surveyor of San Joaquin County made a survey of said land so applied for, and recorded in his office a plat and field-notes thereof, in accordance with the said act of the Legislature and the instructions of the State Surveyor-General.

It was shown by said plat and field-notes of the county surveyor that his survey of the quarter section here in controversy was in accordance with the United States survey; and said quarter section was described upon the plat and in the field-notes of the county surveyor as being swamp and overflowed land.

November 23, 1865, said survey and plat and field-notes were duly approved of record by the State Surveyor-General. (Finding IV, Record, p. 6.)

FOURTH. In April, 1869, Hartwell made another application (his first application disappearing for some reason not stated in the Record) to purchase from the State, under the provisions of the State act of March 28, 1868, this same quarter section as being swamp and overflowed land. Thereupon another survey was made by the county surveyor, which was duly returned to and approved and recorded by the State Surveyor-General. This survey also described the land as being swamp and overflowed. It was made by the same Deputy Surveyor who made the United States survey in 1865. Founded upon aforesaid application and approved survey, the State of California on April 19, 1870, sold this quarter section to Hartwell as being swamp and overflowed, and delivered to him the usual certificate of purchase.

April 1, 1871, Hartwell assigned this certificate in writing to the plaintiff in error herein, T. P. Heath, to whom a patent was issued and delivered by the State of California

July 21, 1876. This patent recited that the land was swamp and overflowed and had been duly and properly surveyed in accordance with law; that full payment had been made to the State for the land; and that all the requirements of the acts of Congress, as well as the acts of the State Legislature, in relation to swamp and overflowed lands had been complied with. (Findings 5, 6, and 7, Record, pp. 6 and 7.)

FIFTH. On January 10, 1866, said Hartwell filed in the Stockton Land Office a declaratory statement under the United States pre-emption law for this quarter section, and on October 29, 1873, he filed his written abandonment thereof. Said filing was accordingly cancelled December 8, 1873, on the records of the Stockton Land Office by order of the Commissioner of the General Land Office.

No other claim to this land was asserted until *July* 24, 1876, three days after the State patent had issued and been delivered to plaintiff in error, when Wallace, the defendant in error, offered for filing at the Stockton Land Office his declaratory statement under the pre-emption laws of the United States. That offer was rejected by the Register for the reason that "the official plat on file in his "office showed said land to have been returned as subject "to periodical overflow." (Findings 8, 9, and 10, Record, pp. 7 and 8.)

SIXTH. Wallace appealed to the Commissioner of the General Land Office, who ordered an investigation at Local Office as to the claim of the State under the first section of the act of Congress approved July 23, 1866 (14 Stat.-at-Large, 218), as having been sold in good faith as swamp land prior to that date.

A decision by the Register and Receiver against this claim of the State was affirmed by said Commissioner, who further held that the State was not entitled to prove the

character of the land under the 4th clause of the 4th section of said act of Congress. Up to this point this proceeding was entirely *ex parte*, neither the State nor the plaintiff in error having been made a party thereto.

The ruling of the Commissioner was reversed by the Secretary of the Interior, who, upon December 28, 1877, ordered the hearing by the Surveyor-General provided for by said 4th clause.

The Surveyor-General decided "that the land was not "in fact swamp and overflowed land on the 28th day of September, 1850;" and the Interior Department on February 25, 1881, affirmed that decision.

Thereupon Wallace was permitted to file his Declaratory Statement at the Stockton Land Office for the quarter section here in question; he proved up and paid for the land in November, 1881; and the United States issued and delivered to him patent therefor in June, 1882 (Findings 11, 12, 13, 15, and 16, Record, pp. 8 and 9).

SEVENTH. Thereafter the State of California applied to the Interior Department for certification to her of the land by virtue of the provisions of the first and second clauses of the 4th section of the aforesaid act of Congress approved July 23, 1866, and of the first and second clauses of section 2488, together with section 2479, U. S. Revised Statutes.

This application was denied upon the sole declared ground that the issue of patent to Wallace exhausted the jurisdiction of the Federal Land Officers (Findings 17 and 18, Record, p. 10).

EIGHTH. That there is no record in the U. S. Land Department showing a selection of said land as swamp and overflowed by, nor a certification thereof to, the State of California, except so far as such selection may be shown by the facts hereinbefore stated.

NINTH. That the defendant took possession of the quarter section in controversy on the first day of September, 1876, more than a month after issue of the State patent to plaintiff in error, and has since withheld the possession from plaintiff.

As a conclusion of law from the foregoing, the court of original jurisdiction found that the plaintiff was not the owner of the tract of land in suit on the first day of September, 1876, and that the defendant was entitled to judgment, which was so ordered.

This judgment was, upon appeal, affirmed by the Supreme Court of the State of California, and the opinion and judgment of that court will be found in printed Record, pp. 11 to 20, inclusive, and also at pages 50 to 62 of 71 Cal. Reports.

This decision was put upon two points:

1st. The first clause of section 4 of the act of Congress approved July 23, 1866 (14 U. S. Stats. p. 219) enacts:

"That in all cases where township surveys have been
" or shall hereafter be made under authority of the United
" States and the plats thereof approved, it shall be the duty
" of the Commissioner of the General Land Office to certify
" over to the State of California as swamp and overflowed
" all the lands represented as such, upon such approved
" plats, within one year from the passage of this act or
" within one year from the return and approval of such
" township plats."

Whilst conceding that, in case of a township survey made by the United States, and plat approved prior to passage of the act of July 23, 1856, and where lands thereon were represented as swamp and overflowed, it became the duty of the Commissioner of the General Land Office as a merely ministerial act to certify such lands to

the State of California within one year after passage of aforesaid act, the act being in effect a confirmation to the State of such land; yet the court below held that the land here in suit was not so represented upon the approved plat, the designation thereon as "land subject to period-" ical overflow," not being the same in meaning as "swamp " ' and overflowed land.' "

The same ruling was made as to first clause of section 2488, U. S. Revised Statutes, which was substantially a re-enactment of the first clause of the fourth section of the act of 1866.

2d. The second clause of section 4, *supra*, is:

" The Commissioner shall direct the United States Sur-" veyor-General for the State of California to examine " the segregation maps and surveys of the swamp and over-" flowed lands made by the State, and when he shall find " them to conform to the system of surveys adopted by " the United States, he shall construct and approve town-" ship plats accordingly and forward them to the General " Land Office for approval."

The second clause of section 2488, Revised Statutes, is substantially the same.

The court held that the survey and plat made on the application to purchase of Hartwell was not a segregation map and survey such as is contemplated by above-quoted clause, yet, conceding it to be such, the court denied that any title vested in the State under said clause of the act of 1866, or of section 2488, Revised Statutes, because it did not appear "that the Commissioner gave any direction to " the United States Surveyor-General for this State as re-" quired by the act; or that if such order was given, it " was complied with; or that any township plat was made " under this order, or, if made, that it was approved at " the General Land Office."

ASSIGNMENT OF ERRORS.

I.

The court erred in holding that the land in suit was not represented either upon the approved township plat, or the approved township survey and plat, as swamp and overflowed, or by a designation equivalent thereto; and that said land was not confirmed to the State by either the first clause of section 4 of the act of July 23, 1866, or by the first clause of section 2488 of the Revised Statutes of the United States.

II.

The court erred in holding that the State surveys and plats and field-notes of 1865 and 1869 (particularly set forth in Findings IV and V of the Record herein), are not the segregation maps and surveys contemplated by the act of Congress of July 23, 1866, and by the second clause of section 2488, R. S.; and that even if they were such segregation maps and surveys, yet that no title could pass to the State by reason of the failure of the Commissioner of the General Land Office, or his subordinates, to act thereon.

III.

The court erred in holding that no title to the land in suit vested in the State of California by force and effect of the said several State surveys and plats, and of the provisions of the said several statutes of the United States.

IV.

The court erred in its conclusion that the plaintiff in error does not hold under the State of California, and

through the aforesaid several acts of Congress, viz: "An "act to enable the State of Arkansas and other States to "reclaim the swamp lands within their limits" (9 Stats.-"at-Large, 519); an act entitled "An act to quiet land titles "in California" (14 Stats.-at-Large, 218); and sections 2479 and 2488 of the Revised Statutes of the United States, a valid title to the premises in suit, and it erred in affirming a judgment against a valid title so derived by the plaintiff in error.

ARGUMENT.

I.

Error in holding that the land in suit was not represented either upon the approved township plat, or the approved township survey and plat, as swamp and overflowed, or by a designation equivalent thereto; and that said land was not confirmed to the State by either the first clause of section 4 of the act of July 23, 1866, or by the first clause of section 2488 of the Revised Statutes of the United States.

(1) By the first clause of section 4 of the act of Congress of July 23, 1866, the Commissioner of the General Land Office is required "to certify over * * * as "swamp and overflowed, all the lands represented as such, "upon such approved plats."

By the first clause of section 2488, R. S., it is provided:

"It shall be the duty of the Commissioner * * * to "certify over * * * as swamp and overflowed lands, "all the lands represented as such upon the approved "township *surveys* and plats, whether made *before* or after "the 23d day of July, 1866, under the authority of the "United States."

Hence, whatever, if any, right the State took by virtue of the township survey and plat, that right became vested when the Revised Statutes took effect long prior to the defendant's declared settlement. Patent was not issued to him until June, 1882 (Finding XVI).

It follows that if, by the United States survey and plat the land was represented as swamp and overflowed, that representation was conclusive upon both the United States and the defendant.

Wright *v.* Roseberry, 121 U. S. 488, 517–18.

(2) The coupling of the word "*surveys*" with the words "and plats" in the first clause of section 2488, makes plain what was before not altogether free from question, viz: the intention of Congress to constitute the entire series of the official acts of the Surveyor-General, and not the plat alone, the standard of determining the representation as to the character of the lands within the township. It is the representation of both the *survey* and plat that now solves the question of character, and effects the statutory identification.

Whatever is done by the surveyor in the field in compliance with the requirements of law or Departmental directions authorized by law, of which record must be made as a basis for the plat, clearly and unquestionably enters into and forms a part of the *survey*. Where the legend upon the plat does not correctly represent the returns of the deputy surveyor, the sworn and duly approved field-notes returned by him must be taken as the survey. The field-notes form the basis of the plat, which is simply a convenient representation or picture of what is shown by the field-notes. Any inscription upon the plat, if couched in doubtful or ambiguous language, must therefore be read in the light of the field-notes, and when contra-

dictory thereto, must give way absolutely to the field-notes. Nothing is more common in the practice of the Land Department than to take the field-notes as correcting and controlling the plat. The notes of the deputy on line, together with a general description of the lands and their quality, go into his field-book. He is especially enjoined to note, from his own observation and reliable information obtained from others, whether any and what land "is swamp, or marsh, or otherwise *subject to inundation to an extent that, without artificial means, would render it unfit for cultivation.*"

Rev. Stat. U. S., sec. 2395, subdivs. seventh and eighth.

Manual of Surveying Instructions, 1 Lester's Land Laws, ed. 1860, pp. 715–19.

(3) The clauses in hand (and others hereinafter referred to) are essentially remedial and their language should be considered in the light of the pre-existing state of things; the conflict of claims in the matter of the identification of the subject of the original grant; the prior Departmental definition of the subject, and the declared reason and purpose of this confirmatory legislation. And this legislation should receive a liberal interpretation, not only by reason of its remedial nature, but, also, because the grant itself, of which this legislation is in aid, imposes upon the State the *duty* and the *burden* of *reclamation.*

Platt *v.* Union Pac. Rd. Co., 99 U. S. 48.

United States *v.* Freeman, 3 How. 556, 565.

United States *v.* Union Pac. Rd. Co., 91 U. S. 72.

3 Washb. on Real Property (5th ed.), page 202.

Martin *v.* Durand, 63 Cal. 42–3.

Wright *v.* Roseberry (*supra*).

"Swamp Lands in California," Copp's Pub. Land Laws (ed. 1875), pages 453–462.

On the 21st day of November, 1850, the Land Department thus defined the lands of the grant of 1850:

"This act clearly and unquestionably grants to the several States those lands which, from being swampy or "subject to overflow, are unfit for cultivation. In this "class is included also all lands which, though dry part "of the year, are subject to inundation at the planting, "growing, or harvesting season, so as to destroy the crop, "and therefore are unfit for cultivation, taking the average of the seasons, for a reasonable number of years, as "the rule of determination."

1 Lester's Land Laws (ed. 1860), No. 574, page 543.

By Circular of the General Land Office of March 8, 1864, these lands are designated as lands "swampy or "subject to such periodical overflows as to injure or destroy the crops;" and the same definition is adhered to as late as January 15, 1874 (in Circular at page 472, Copp's Pub. Land Laws, ed. 1875).

And see People *v.* Morrill, 26 Cal. 336.

Such was the practical interpretation which the General Government gave to the grant from November, 1850, to January, 1874. This interpretation must have been in view of Congress in its legislation in question during the same period.

There have been decisions of the Land Department which denied the right of the State to lands subject to "periodical overflow," but upon examination these will prove to be cases where such designation was not only put upon the plat but where the field-notes returned the land as being suitable for cultivation; but where the field-notes (as was the case here as per Finding III, Record, p. 6) returned the lands as being incapable of being cultivated for the raising of crops, because of periodical over-

flow, except by suitable reclamation works, the Department has uniformly awarded such lands to the State under the swamp grant. A strong decision in point occurs in 9 L. D. 167. Section 3, of the swamp grant of September 28, 1850, provides :

"That in making out a list and plats of the land afore-
" said, all legal subdivisions, the greater part of which is
" wet and unfit for cultivation, shall be included in said
" lists and plats."

Secretary of the Interior Noble in above decision held that :

"Taking this section in connection with the first section
" of the act, donating to the State 'those swamp and over-
"' flowed-lands made unfit thereby for cultivation,' it is clear
" that the act intended to grant not solely such lands as
" might strictly come under the description 'swamp lands,'
" but such as were so 'wet' as to be rendered thereby un-
" fit for cultivation. This is apparent, when it is consid-
" ered that the act of March 2, 1849, designated the lands
" contemplated by the grant as 'swamp and overflowed,'
" whereas the grant of September 28, 1850, enlarged the
" provisions of the grant by including therein 'land the
"' greater part of which is *wet* and unfit for cultivation."

See State of Iowa, 9 L. D. 640.

In Merrill *v.* Tobin, 30 Fed. Rep. 738, the U. S. Circuit Court for the Northern District of Iowa held that lands which by reason of swamp *or overflow* become unfit for cultivation are within the purview of the grant of 1850.

See also Keeran *v.* Griffith, 31 Cal. 461.

Thompson *v.* Thornton, 50 Cal. 142.

The third finding of fact brings the case at bar clearly within these rulings.

The State substantially engrafted the Government's

definition of November, 1850, upon her act of 1858 "to "provide for the sale and reclamation of the swamp and "overflowed lands."

Section 2 of that act required the affidavit of an applicant to purchase to state * * * "that every forty- "acre lot, or its equivalent subdivision, of the land sought "to be purchased, is the greater part swamp or swampy, "or subject to inundation at the planting, growing, or "harvesting season, so as to endanger, injure, or destroy "the crop, taking the average season for a reasonable "number of years, prior to the date one thousand eight "hundred and fifty, as a rule of determination" (Session acts 1859, ch. 314, page 340).

(4) Both the Land Department and the State, therefore, concurred in the one and same construction, to wit, that the granted lands are such as are made "unfit for cultiva- "tion" because of their being swamp or swampy, or subject to such periodical overflows as to injure or destroy the crops unless protected by dams and levees.

And it is so held by the courts.

Keller *v.* Brickley, 78 Ill. 133.

Merrill *v.* Tobin, 30 Fed. Rep. 738.

Merrill *v.* Spencer, Id. 743.

Here the authorities of the United States verify and record, in respect to this land, that it is "subject to *inun-* "*dation* by the overflow of the Calaveras River and its "branches, and is thus *rendered incapable of being cultivated* "*for the raising of crops, except by means of banks and le-* "*vees, which have been erected to prevent the overflow of the* "*water during the winter and spring months.*" (Finding III.)

The inscription, "Subject to periodical overflow" on the face of the plat admits of but one fair and reasonable interpretation, to wit :

Subject to periodical overflows of the extent, regularity, and frequency, and with the effect, in the return described.

So read, the representation brings the land within the exact cast of the grant itself, namely, "overflowed land "made unfit thereby for cultivation." Thereby, and by force of the statutory provisions in question, the United States gave up all claim, if they ever had any, to the land thus described.

Reichart *v.* Felps, 6 Wall. 160.

And nothing more is needed to complete the confirmation of title to the State.

Wright *v.* Roseberry, *supra.*

In concluding this part of the argument it is not improper to state that the public records of the General Land Office in the Swamp Division show that upon the *same* marking on which the claim of the plaintiff in error is founded in this case, as swamp and overflowed land, there have been patented to the State as swamp lands 2,408.73 acres in the *same* township, and part thereof being in the *same* section as the land here involved.

In view of these facts it is certainly strained construction to now hold that where the Executive clothed with duty and jurisdiction had, on the *same* marking, patented lands in the *same* section, and the entire 2,408 acres, both prior and subsequent to the demand of the State for like patent here, refusal to so patent *this* land can be upheld as a just or consistent exercise of power (see records General Land Office, Stockton, California, swamp patents No. 9 of April 11, 1877, and No. 11 of December 16, 1866).

In San Francisco Savings Union *et al. v.* Irwin (28 Fed. Rep. 708), affirmed by this Court in 136 U.S., p. 578, upon the *same* showing of "periodical overflow" rendering the

land therein involved incapable of producing "the ordi-"nary crops of the country without protecting it with "levees from such overflow," the title of the State under the swamp grant was affirmed. The language of Mr. Justice Field in deciding that case on the Circuit should settle all doubt here upon the finding of the character of this land appearing in the record.

II.

Referring to the 2d specification of error herein, plaintiff maintains that the State's surveys and plats of 1865 and 1869, respectively, are "segregation maps and surveys" within the intent and meaning of the 2d clause of section 4 of the act of July 23, 1866, and the 2d clause of section 2488, R. S.

(*a*) The Surveyor-General of the State and the County Surveyors are bound to fidelity and correctness in their performance of official duty by the obligations of an oath and bond, and act under all the legal sanctions by and to which the United States Surveyor-General and his deputies are bound and held. Both make record of their official acts.

An act concerning the office of Surveyor-General, Session Laws of California, 1850, ch. 104, secs. 2, 9 (pp. 256–7).

An act prescribing the duties of County Surveyors, Id. ch. 67, secs. 1, 2 (pp. 170–1).

An act concerning the official bonds of officers, Id. ch. 21, p. 74.

Then by "An act to provide for the sale of the swamp "and overflowed lands belonging to this State," approved April 28, 1855 (Session Laws, 1855, ch. 151, page 189), it is provided:

"All surveys made under the provisions of this act shall " be according to instructions from the Surveyor-General " of this State, which instructions shall be as near as prac- " ticable in accordance with the surveys of the public lands " of the General Government." (Sec. 12.)

By " An act to provide for the sale and reclamation of " the swamp and overflowed lands of this State," approved April 21, 1858 (Session Laws 1858, ch. 235, page 198), it is provided:

" All surveys under the provisions of this act shall be " made according to the instructions from the Surveyor- " General and shall be made to conform to the surveys of " the public lands by the General Government, except that " the lands held by actual settlers shall be surveyed after " what is known as the geodetic method, and such geo- " detic surveys shall be made to conform to the lines and " boundaries established by such settlers " (section 11).

By " An act to provide for the reclamation and segrega- " tion of swamp and overflowed, and salt marsh and tide " lands, donated to the State of California by act of Con- " gress," approved May 13, 1861 (Session Laws 1861, ch. 352, page 355), it is provided:

" The county surveyors of the several counties of this " State shall, immediately after the organization of the " Board of Commissioners, proceed to segregate the swamp " and overflowed lands within their respective counties from " the high lands in said counties, and make complete maps " of all the swamp and overflowed lands, within their respec- " tive counties, in legal subdivisions of sections and parts of " sections, together with a tabular statement of all such " lands as have been sold by the State, and under what act " the same were sold, of all lands claimed and by whom " claimed, and as nearly as possible by what title the same " are held, and file the said tabular statement in the " County Recorder's Office of their respective counties,

" also transmit duplicates of said maps to the Surveyor-
" General of the State : Provided, however, That it shall be
" discretionary with the Board of Commissioners whether
" land *already surveyed and segregated under any former*
" *act* for the sale and reclamation of swamp and overflowed
" lands shall be *segregated or surveyed under this act.*"
* * * (Sec. 19.)

" The Surveyor-General shall compile a general map of
" the State in duplicate, showing all the swamp and over-
" flowed lands of the State, which shall have been returned
" by the county surveyors as the property of the State,
" together with the county boundary lines where crossing the
" same. He shall also enter thereon the number corre-
" sponding with the affidavit ; he shall also compile from
" the testimony received and on file in his office a general
" schedule of the swamp lands in the State by their de-
" scription ; he shall also distinguish on said map the
" lands already sold by the State as swamp and overflowed ;
" he shall prepare a report showing any cases in which
" the swamp lands have been infringed upon by the
" United States Government surveys." (Sec. 21.)

And see section 26, *Id.*

By "An act to provide for the management and sale of the lands belonging to this State," approved March 28, 1868 (Session Laws 1867–'68, ch. 415, page 507) it is provided :

" All surveys made under the provisions of this act
" shall be according to the instructions of the Surveyor-
" General, and *shall be made according to the rectangular*
" *system adopted by the United States in the survey of the*
" *public lands*, and shall conform as near as practicable
" to the lines of the public surveys : *Provided*, That in
" salt marsh or tide land surveys the Surveyor-General
" may order a departure from said system." (Sec. 19.)

And by section 16 (*Id.*) the Surveyor-General is required to issue the necessary instructions in respect to surveys.

The act of April 27, 1863, entitled "An act to provide "for the sale of certain lands belonging to the State" (Session Laws 1863, ch. 397, page 591), under which the first survey for the State was made, provides that the County Surveyor shall mark upon the map and record in the books of his office all approved surveys (Sec. 7).

Further: "The Surveyor-General shall keep at his "office complete maps of the State, so far as surveys "have been returned to him, upon which shall be shown "all the lands sold by the State, and all surveys of land "applied for which have been approved by him, showing, "also, all lands for which certificates of purchase or pat-"ents have been issued." (Section 9.)

The same officer as *ex officio* "Register of the State Land "Office" was required "to keep in a well-bound set of "books a complete record of all swamp and over-flowed "lands. * * * He shall also keep the proper plats of "the above-named lands, upon which plats all approved "locations and surveys shall be designated by their num-"bers; and when certificates of purchase or patents shall "have been issued, the same shall also be noted on the "plats. But so long as the Surveyor-General performs "the duties of Register, but one set of maps shall be re-"quired." (Section 13.)

And by section 27 (Id.) the Surveyor-General is authorized to issue all necessary instructions concerning surveys.

The act of *March* 28, 1868 (*supra*), under which the second survey for the State was made, makes it the duty of the Surveyor-General as *ex-officio* Register "to keep "separate, distinct, and complete accounts and records in "relation to each class of lands to which the State is or "may be entitled; which accounts and records shall show "the number of the survey or location, the date of the

" approval, the name of the locator, the description of the " lands by township, range, section, and subdivision of " section * * *

" He shall also keep the proper plats of the above- " named lands, upon which all approved locations and sur- " veys shall be designated by their numbers; and when " certificates of purchase or patents shall have been issued, " the same shall also be noted on the plats. But so long as " the Surveyor-General performs the duties of Register, " but one set of maps shall be required." (Section 3.)

By section 18 of the same act it is provided:

" It shall be the duty of the county surveyor, immediately " upon his receiving an application for any survey re- " quired by this act, to endorse the date of the receipt " thereon, and note the same in a book to be furnished by " the Surveyor-General and kept in his office for that pur- " pose, in the regular order in which it is received, giving " the name and address of the applicant and the descrip- " tion of the land by township, range, section, and sub- " division of section, which book shall always be open for " public inspection. He shall, within thirty days after re- " ceiving such application if the lands are subject to sale, " complete the survey, plat, and field-notes which shall be " recorded by him in a book kept in his office for that pur- " pose; and duplicate copies thereof, together with a copy " of the application, shall be forwarded to the Surveyor- " General for approval. The said county surveyor shall, " immediately upon the receipt of an approved survey, " record said approval; he shall mark all approved " surveys upon the maps of his office, and all his said " books and maps shall at all times be open to public in- " spection."

And section 10, of the same act, reads:

" It shall be the duty of the Surveyor-General to ex- " amine all surveys made under the provisions of this act,

" and, if found correct, approve and return the same with-
" out delay to the county surveyor making the same."

Thus it is seen that the State surveys were made in the field, by her sworn officer in charge of her lands, under instructions to conform, and in actual conformity with the Governmental system.

It will be presumed that these officers acted in strict accordance with the law and the instructions, and that the Surveyor-General, *ex officio* Register of the State Land Office, made all the statutory entries in the records and on the maps in his office showing the land to be of the class as claimed.

Bank of U. S. *v.* Dandridge, 12 Wheat. 70.
Gonzales *v.* Ross, 120 U. S. 606.

This method of State segregation in small parcels not exceeding 640 acres, commencing with the act of April 28, 1855 (*supra*), sec. 10, has ever since been followed.

Act of Apl. 21, 1858, *supra*, sec. 2.
Act of May 13, 1861, *supra*, sec. 26.

That the State held these surveys of small parcels to be surveys of *segregation* is clearly declared in the cited *section* 19 (*supra*) of the last-named act, wherein the Legislature says :

" *Provided, however*, That it shall be discretionary with
" the Board of Commissioners whether land *already sur-*
" *veyed and segregated under any former act* for the sale
" and reclamation of swamp and overflowed lands shall
" be *resegregated* or surveyed under this act."

So, again, Congress recognized by the act of July 23, 1866, surveys of this class as *segregation* surveys.

The proviso in section 4, referring to surveys " made by
" said State," declares :

"That in segregating *large* bodies of land, notoriously "and obviously swamp and overflowed, it shall not be "necessary to subdivide the same, but to run the exterior "lines of such body of land."

The statute had in view *every* segregation survey for dispensing with (as it does) subdivisions "of large bodies," it impliedly sanctions the surveys of *small* bodies wherein the subdivision rule must have been observed.

And this applies, as well, to the 2d clause of sec. 2488 (Rev. Stat.)

The two second clauses in question, in effect (to the end that titles be quieted), render the State's record as decisive against the General Government as is the Government's own record of the same fact referred to in the several first clauses hereinbefore considered, except that as a condition precedent to the operation of the second clauses "the "State surveys must conform to the system of surveys "adopted by the United States." In every case wherein the State survey accords with that system these provisions render the field-notes of the Surveyor-General of the State, and his maps based thereon, as conclusive of the character of "swamp and overflowed" as are the field-notes and maps of the like officer of the United States.

For land in other conditions, to wit, where the State's survey is not on that system, or where there has been no township survey by the United States or the State, shall "claim as swamp and overflowed any land not represented "as such upon the map or in the returns of the surveyor," the statutes provide special remedies in their respective 3d and 4th clauses.

It was nothing new in the administration of this grant to recognize the State's record and map as the rule of decision (United States *v.* Louisiana, 123 U. S. 37); and Congress imparted to it, in respect to California, the form

of an enactment with an added property of *conclusiveness* against the Government.

III.

The court also erred in holding that the action of the Commissioner and United States Surveyor-General was an indispensable prerequisite to the claimed confirmation of the said several second clauses.

It is not questioned that these surveys conform to the Governmental system, and that fact is established by the record accredited by Congress—the State's "segregation " maps and surveys."

The duty of examining these and of correspondingly reconstructing the Government's plats is imposed upon the Surveyor-General by order of the Commissioner. The Department has repeatedly said that when that duty is performed, the second clause is, to all intents and purposes, a confirmation.

"Swamp Lands in California," *supra.*

Central Pacific Railroad *v.* State of California, 4 Copp's Land Owner, 150.

In the latter case it is said by the Secretary of the Interior:

" I am of the opinion that this clause confirms absolutely " to the State all lands not in a state of reservation, which " had been segregated by her prior to July 23, 1866, if " the State surveys were made on the rectangular system, " whether the lands had been surveyed by the United " States or not, or whether they were swamp or dry " lands."

These opinions, of themselves not controlling, do yet serve to show the Department's appreciation of the impor-

tance and value to the State of official performance of the given statutory duty.

But the right of the State vests upon the fact of the statutory segregation, and is not dependent upon the act or the omission of the Commissioner or his subordinates.

The principle, to wit, that "that which ought to have "been done is to be regarded as done in favor of him to "whom and against him from whom performance is due," should be and has been interposed for the conservation of the rights of the State.

The State took possession of this land, if not before, certainly after the passage of the act of July 23, 1866, and then resurveyed and sold it. This second survey of 1869 (Finding V) was and is *unquestionably* on "the rectangular "system." Every other form of survey was expressly inhibited by section 19 of the act of March 28, 1868 (*supra*), by authority of which this survey was made. Section 2488 (Rev. Stats.) took effect upon the premises in controversy more than two years in advance of the defendant's settlement of April, 1876.

No obligation or duty, statutory or otherwise, *demanded of the State any action whatever.* There is no limitation as to time of performance by the Commissioner and Surveyor-General, and the duty of performance is *perpetual.*

Ryan *v.* Carter, 93 U. S. 78, 82.
Glasgow *v.* Hortiz, 1 Black. 595–602.
Wright *v.* Roseberry, *supra.*
United States *v.* Louisiana, *supra.*
Miller *v.* Tobin, 16 Pac. Rep. 161.
Johnson *v.* Ballou, 28 Mich. 379.

"That is certain which can be made certain." The State's record certifies the lands segregated by her on the rectangular system as being or claimed to be "swamp and

" overflowed." If the Surveyor-General of the United States had looked at that record he must have found this tract in the prescribed condition entitling it to a certificate of confirmation. It is sufficient, however, that the land be thus identified; the State takes the benefit of the statute without certification.

Wright *v.* Roseberry, *supra.*

Stockton *v.* Williams, 1 Doug. (Mich.) 546.

In any view this land was in a condition entitling it to complete confirmation. Action by the Commissioner and Surveyor-General must have so resulted. The State had actual possession in the only mode by which she could take and keep it. She had a right to the possession, and that *right was transferred to her purchaser* and remains with him. No shadow of right was initiated by the entry and occupancy of the defendant in error. It was a naked, unlawful intrusion upon land which was then, and still is, in a *state of* reservation even though the prescribed executory, or rather ministerial, duties of these officers be essential prerequisites to the investiture of the State with the legal title.

And for and upon the reasons and authorities above cited, the court erred in its conclusion of law against title in the plaintiff, through the State, by operation of the said several second clauses.

Rev. Stats. U. S., secs. 2258, 2271.

Hedley *v.* Leonard, 35 Mich. 72.

Houghton *v.* Commrs. State Land Office, 23 Mich. 270.

Looney *v.* Bagley (Tex.), 7 S. W. 360.

Wensor *v.* O'Connor (Tex.), 8 S. W. 519.

Doolan *v.* Carr, 125 U. S. p. 618.

" Review of the Swamp Land Laws and the Swamp " grants to Minnesota," 4 Copp's Land Owner, 149.

Miller *v.* Tobin, *supra.*

The right of the State is prior in time, and is not lost or forfeited by the delay of the Federal officers, without fault on her part.

McCreery *v.* Haskell, 119 U. S. 327.

Crowley *v.* State of Oregon, 7 Copp's Ld. Owner, 28.

Martin *v.* Marks, 97 U. S. 345.

IV.

The finding of the Surveyor-General, affirmed by the Department of the Interior, against "swamp and over-"flowed" in 1881, is not an element for consideration.

The inquiry as to character of land was not within the jurisdiction or power of the Department—because:

1st. The return of swamp and overflowed by the United States survey was, *ipso facto*, conclusive as to character.

2d. The order for said inquiry was made more than twelve years after the first, and more than eight years after the second segregation survey by the State, of which several surveys the Department *is chargeable with notice.*

There was no power or authority to hold an investigation and determine the character of the land by *testimony without* having first examined the State's "segregration "maps and surveys," which duty was never performed.

3d. After the passage of the act of July 23, 1866, and the Revised Statutes of June 22, 1874, their prescribed (Findings XVII, XVIII.)
mode of identifying the lands of the grant coming within the scope of these provisions supersedes every pre-existing mode, including action thereon by the Secretary of the Interior.

4th. At the time of issuing the order for the investigation as to character the case was not one within the

4th clause of the 4th section, and neither the Commissioner nor the Secretary had authority or jurisdiction to make the order.

5th. When there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel.

2 Herman on Estoppel, 1365.
Wright *v.* Roseberry, *supra* (p. 512).
Crowley *v.* State of Oregon, *supra.*
Zottman *v.* San Francisco, 20 Cal. 96.
Martin *v.* Zellerbach, 38 Cal. 300.

V.

The patent of the United States to the defendant did not confer upon him a right of possession, for that right had been previously passed by the United States to the plaintiff's grantor (Noyes *v.* Mantle, 127 U. S. 354), and her certificate and patent vested it in the plaintiff.

It is respectfully submitted that the judgment should be reversed, with directions for the entry of judgment by the court below for the plaintiff.

A. T. BRITTON,
A. B. BROWNE,
Attys. for Plaintiff in Error.

FILED.
JAN 9 1891
JAMES F. MCKE
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

T. P. HEATH, Plaintiff in Error,

vs.

M. T. WALLACE, Defendant in Error.

No. 528.

In Error to the Supreme Court of the State of California.

BRIEF FOR DEFENDANT IN ERROR.

JAMES K. REDINGTON,
WM. J. JOHNSTON,
Attorneys for Defendant in Error.

IN THE

Supreme Court of the United States.

October Term, 1890.

T. P. HEATH, Plaintiff in Error,
vs.
M. T. WALLACE, Defendant in Error. } No. 528.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief for Defendant in Error.

STATEMENT.

The action is ejectment, or the quivalent action under the California practice. The plaintiff relies upon a claim of title under the general swamp-land grant, so called, of September 28, 1850 (9 Stat., 520), and the special act applicable only to California, relating in part to that subject, of July 23, 1866 (14 Stat., 218, section 4). There is no pretense that any certification, patent or other evidence of title ever issued, from the United States to the State for the premises, and the claim of title rests solely upon the proposition that there was a grant *in*

presenti by the statutes above referred to, and that under the facts the land in question was embraced within such grant.

The defendant relies upon a patent of the United States issued to him under the pre-emption laws of the United States, after previous full compliance on his part with all the requirements of such laws.

Prior to the issue of said patent to defendant in error, a formal claim by the State and by the plaintiff in error under the State, to said premises under said legislation of Congress, had been presented to the Commissioner of the General Land Office, had been by him rejected as invalid, had been taken by appeal to the Secretary of the Interior and had been rejected by this last named officer upon hearing and determination of such appeal. These proceedings were taken and occurred in a regular and formal hearing or trial, before the Surveyor-General of the United States for the State of California, pursuant to an order of the Secretary of the Interior, to determine the character of the premises as swamp and overflowed or otherwise, under the fourth clause of the fourth section of said act of July 23, 1866, and after a decision of said Secretary, affirming the right of the State to such a hearing, upon an appeal by the State from a decision of the Commissioner refusing the same. Of the trial so ordered and held, all parties had notice, formal trial of the question ensued, the Surveyor-General decided that the land was not in fact swamp and overflowed on the 28th day of September, 1850, and this decision was thereafter affirmed by the Secretary of the Interior and the land awarded to the defendant in error under the pre-emption law. Thereupon said defendant, after perfecting his claim, entered the land and, as above stated, received letters-patent therefor. (Findings, X, XI, XII, XIII, XIV, XV, XVI.)

Counsel for plaintiff in error are understood to further

rely upon title claimed to be established under the first and second clauses of the fourth section of the act of July 23, 1866. The facts upon which such claims are based will be noticed herein as the points are reached for discussion.

The judgment in the trial court was for defendant in error. This judgment was affirmed by the Supreme Court of the State, and the case thereupon reached this Court upon writ of error.

BRIEF.

It was formerly doubted whether, in this form of action, suit could be maintained upon any title not evidenced by some certificate or patent issued by the United States after determination that the land was of the character embraced by the grant. Under recent decisions of the court, however, it must now be admitted that in cases where the proper authorities of the United States have failed, neglected, or refused to identify and set apart the tracts granted, the State is not concluded or prejudiced thereby; that in an action of ejectment under such circumstances suit can be maintained by showing that the land is of the character contemplated by the grant, and that for this purpose parol testimony as to the fact is admissible.

Wright *v.* Roseberry, 121 U. S., 488.
San Francisco Savings Union *v.* Irwin, 136 *ib.*, 578.

These cases go to the extent above stated, and no further. In Wright *v.* Roseberry, which was simply affirmed without comment in the exactly similar case in 136 U. S., the court below, the Supreme Court of the State, had admitted the patents of the defendant, and held that for want of a certificate as evidence of title from the United

States no title ever vested in the State, and that she could not therefore convey a title to plaintiff upon which ejectment could be maintained. This was the point raised by the writ of error, considered and decided. There was no segregation of identification of the tracts by the United States, and no adjustment of rights as between the State and those claiming adversely. The exact question is thus stated by Mr. Justice Field in delivering the opinion of the court (page 494):

"For want of such certificate, the court decided that the title to the demanded premises never vested in the State, and that she could not convey a title to the plaintiff upon which he could maintain an action of ejectment against persons in possession under patents of the United States. This ruling constitutes the alleged error for which a reversal is sought."

And after an elaborate review of the whole case, embracing what is probably the most learned, thorough, and perfect, as well as most interesting history of the swamp-land grant of 1850 extant, with reference to the cases considering and construing it, the learned justice thus announces the judgment of the court (page 521):

"For the error in holding that the certificate of the Commissioner was necessary to pass the title of the demanded premises to the State, the case must go back for a new trial, when the parties will be at liberty to show whether or not the lands in controversy were in fact swamp and overflowed on the day that the swamp-land act of 1850 took effect."

But in the consideration of the case the question of the effect and identification of lands under like circumstances by the United States, instead of a neglect or a refusal to so identify them, was considered and decided. On this point the learned justice said (page 500):

"When identified, the title would become perfect as of the date of the act. The patent would be evidence of

such identification and declaratory of the title conveyed. It would establish definitely the extent and boundaries of the swamp and overflowed lands in any township, and thus render it unnecessary to resort to oral evidence on that subject. It would settle what otherwise might always be a mooted point, whether the greater part of any legal subdivision was so wet and unfit for cultivation as to carry the whole subdivision into the list. The determination of the Secretary upon these matters, as shown by the patent, would be conclusive as against any collateral attacks, he being the officer to whose supervision and control the matter is especially confided."

And again (page 509):

"The result of these decisions is that the grant of 1850 is one *in presenti*, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the Secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but when that officer has neglected or failed to make the identification it is competent for the grantees of the State, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object. A resort to such mode of identification would also seem to be permissible, where the Secretary declares his inability to certify the lands to the State for any cause other than a consideration of their character."

It thus appears that according to the latest decisions of this court on the subject the segregation of the swamp and overflowed lands in any particular township or section of country, and certainly of any particular tract, from the lands not swamp and overflowed is conclusive; that the right of the State to show the real character of the lands is confined to cases where this has not been done, and that resort to any other method of identification, *i. e.*, parol testimony, is not permissible when certification is refused for cause based upon "consideration of their character."

In other words, this recent adjudication by the court is simply a reaffirmance of the many preceding cases involving consideration of this and other like conditions, holding that the decisions of the land department, acting in the line of its jurisdiction in the ascertainment of any question of fact, *i. e.*, the character of land as falling within or without the descriptive terms of a grant, are conclusive in all subsequent proceedings.

The land department is a tribunal of a quasi-judicial character appointed by Congress to decide certain questions relating to the public lands, and its decisions upon matters of fact within its jurisdiction, in the absence of fraud or imposition, is conclusive everywhere else. To this extent its decisions are judgments of a court of competent jurisdiction, and conclude all parties and priories.

Johnson *v.* Towsley, 13 Wall., 72.
Warren *v.* Van Brunt, 19 *ib.*, 646.
Shepley *v.* Cowan, 91 U. S., 330.
Moore *v.* Robbins, 96 *ib.*, 530.
Marquiz *v.* Frisbie, 101 *ib.*, 473.
Vance *v.* Burbank, *ib.*, 514.
Quinby *v.* Conlan, 104 *ib.*, 420.
St. Louis Smelting Co. *v.* Kemp, *ib.*, 636.
Steel *v.* St. Louis Smelting Co. 106 *ib.*, 447.
Baldwin *v.* Starks, 107 *ib.*, 463.
Lee *v.* Johnson, 116 *ib.*, 48.

And in Steele *v.* The Smelting Company (*supra*, page 450) the Court expresses "unpleasant surprise" that its many decisions upon this point should be overlooked.

In the case of the United States *v.* Minor, 114 U. S. 233, the court points out the exact line of cases to which this doctrine applies, at least so far as the United States is concerned. It applies in the language of the Court (p. 243), to cases:

"Where a contest between individuals, for the right to a patent to public lands, has been brought before those officers and both parties have been represented and had a fair hearing;"

And the court thereupon adds:

"*Those parties* are concluded, as to all the facts thus in issue, by the decision of the officers."

Applying this clear law to the case at bar and it follows that the decision of the Secretary of the Interior recited in Finding XIV, is absolutely conclusive of the present case. The proceeding was a formal contest between the State and the defendant in error ordered by the Secretary of the Interior, under a clear provision of the act of 1866, *upon the application and appeal of the State herself* after a refusal of the Commissioner of the General Land Office to accord her such a hearing. It was a formal trial for title to public land, involving a single question of fact, to wit, the character of the land as swamp and overflowed or otherwise. All parties interested were duly notified; they were brought before the Surveyor-General, the officer authorized to hear and determine the matter by the act of 1866, subject to the review of the Commissioner and under general laws, the Secretary of the Interior; they were represented and had a fair hearing, and the final decision of the Secretary was that the land in controversy was not swamp and overflowed, did not inure to the State, and that the claim of the defendant in error was good and valid. And this decision thereupon became, and was, further evidenced and declared by the issuance of letters-patent to the defendant in error.

We submit that this judgment of the Secretary is absolutely conclusive in the case at bar upon the State and her privy, the plaintiff in error, and that the judgment of the Supreme Court of the State should, on this ground alone, be affirmed.

But it is claimed that the act of July 23, 1866 (14 Stat., 218), adds something to the dignity of the title set up under the State. Indeed, this seems to be the main reliance of counsel for plaintiff in error. A brief examination of that act in connection with the findings will show that here, as under the general provisions of the act of 1850, the plaintiff in error has no title.

The parts of the act of 1866, relied upon are the first and second clauses of the fourth section. As originally commenced the action evidently contemplated some claim of confirmation by section one, but any such pretension is fully disposed of by the case of Wright *v.* Roseberry (*supra*), and claim of counsel in this court is limited to the clauses of section four above referred to.

FIRST CLAUSE OF SECTION 4; ACT OF 1866.

The first clause of section four is as follows:

"*And be it further enacted*, That in all cases where township surveys have been, or shall hereafter be, made under authority of the United States, and the plats thereof approved, it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California, as swamp and overflowed, all the lands represented as such, upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats."

And section 2488 of the Revised Statutes, re-enacting this provision, reads as follows:

"It shall be the duty of the Commissioner of the General Land Office to certify over to the State of California as swamp and overflowed lands, all the lands represented as such upon the approved township surveys and plats, whether made before or after the 23d day of July, 1866, under the authority of the United States."

The claim is that by virtue of these statutes, and upon

the assumption that the land in question is represented upon some survey or plat as swamp and overflowed land, title has so passed to the State as to be available to the plaintiff in the case at bar, and apparently to support this claim the decision of the court in Wright *v.* Roseberry (*supra*) is cited.

This position is untenable. Even if the land be so represented upon some survey and plat neither the statute itself nor the decision in Wright *v.* Roseberry works any such result. The statute simply provides that in such case it shall be the duty of the Commissioner to certify the lands to the State. The decision of the court simply says that while it is the province and the duty of the land department to segregate or designate swamp lands according to the rule of this statute, and that if so designated the departmental decision will conclude the question, yet, that if the land department *has failed to do this*, then parol evidence is admissible to so designate the lands. As under the original act of 1850, jurisdiction vests with the department to determine the fact necessary to designate the land as swamp and overflowed or otherwise, so under this clause of the act of 1866 jurisdiction vests in the department to determine whether the land is so represented on any survey or plat; and even if it appeared that this action of the department had been neglected or refused, the decision in Wright *v.* Roseberry would simply make parol evidence of the fact admissible at the trial. There is no such question in the case at bar. In fact, testimony on the point was admitted and is recited in the findings.

The act of 1866, so far as this provision is concerned, simply engrafted upon pre-existing law, a new rule of evidence, to guide the land department in designating or identifying lands inuring to the State. Wheras under the act of 1850, it was without a rule of evidence, the act of 1866 gave it such a rule, to wit, that whatever

had been designated upon the public plats as swamp and overflowed should be certified to the State. But the jurisdiction to determine what such plats showed still remained with the Government, and it was only on failure to exercise that jurisdiction that the State was permitted to show the fact, in a suit of ejectment, by testimony. The land department did exercise that jurisdiction and by the Secretary's decision of February 25, 1881 (Finding XIV), necessarily embracing and covering this phase of the case, decided adversely to the State. This decision of the Secretary, under the authorities cited, is conclusive also of the fact that no survey or plat so designated the land.

But even if this were otherwise, and the court is now at liberty to look into the facts to determine whether any survey or plat so designated the land and thereupon decide whether title is in the State for the purposes of this suit, the record shows that no survey or plat ever so designated the land.

The language of the act is entirely clear and unambiguous. It declares that it shall be the duty of the Commissioner to certify over such land, and necessarily only such land, as were represented as "*swamp and overflowed.*" This is an entirely plain command. Its complete execution required only an *inspection of the plat.* If that inspection showed any lands to which the above-quoted designation had been applied, then such land was to be certified. No other designation or appellation is embraced, and none other authorized any certification. When those words were found on the plat the land was embraced, not otherwise.

The finding is that the only official plat in existence of this township was the plat of 1865 (Finding I), which plat exhibits a large compact body of land, colored blue, across which was written the words "land subject to periodical overflow." The field notes of this survey note, at

intervals, six points where the surveyor crossed "sloughs" (Finding II). In the *descriptive field notes* the land colored blue is represented as subject to inundation by the overflow of the Calaveras River and its branches, and as thus being rendered incapable of cultivation for crops, except by means of banks and levees which had been erected for that purpose (Finding III). There is no finding as to periodicity in respect to this overflow, or whether it occurred every year or whether the banks and levees by which it was prevented were recent or ancient.

It is thus seen from the findings that no plat contained any designation of the tract in question as "swamp and overflowed." The words prescribed by the act of 1866, the presence of which would alone authorize a certification, are wholly absent. The plat in question is not within the descriptive terms of the act, and is not covered by the remedial provision.

It is no answer to this proposition to say that the language used is equivalent or synonymous with "swamp and overflowed," even if that were true. Congress was legislating advisedly upon this subject. It was enacting a remedy of great liberality to the State. It was giving it the benefit of a certain technical designation found on some of the Government plats, and allowing that designation to control the segregation of the land. It had in view the well-known fact that many plats contained that particular designation, that many others did not, and that many contained other designations and other notations. From the general mass it selected this particular class, embraced none of the others, and declared that the class selected should be entitled to certification. By every legitimate rule of construction all other classes were necessarily excluded.

Nor is it any answer to say that, if this is true, Congress adopted an unknown, arbitrary rule. As matter of

fact it was not unknown or arbitrary. It followed the exact language of the act of 1850, of all acts supplementary thereto or amendatory thereof, and it was in consonance with the rule of decision under those acts by the land department. But even if this were otherwise, Congress had the right to establish a purely arbitrary rule and having done so it must be respected and obeyed.

The adroit contention of counsel for plaintiff in error avoids this plain feature of the case and assumes, as if conceded, the proposition that the statute does not mean what it plainly says but that on the contrary it covers, not only lands so designated but also *other* tracts covered by *other* designations, if those other designations can be construed as giving the land a wet or swampy character. That is the sum and substance of the argument. We deny that this is even plausible and assert on the contrary that descriptive terms cannot be thus imported into the statute; that when the statute says the lands must be *designated* as "swamp and overflowed," that language and none other fills the requirement, and that a designation as "lands subject to periodical overflow," or as subject to inundation, or as crossed at points by sloughs, or as incapable of cultivation without banks or levees, is not within the descriptive terms. Congress did not say that lands shown to be wet, or subject to inundation, or intersected by sloughs or incapable of cultivation excepted when protected by levees, should be certified, or that lands so *designated* should be certified, but on the contrary that the Commissioner should certify lands *designated* by an entirely different appellation, "swamp and overflowed." No lands not so designated are within the act.

But even if it be conceded that the act embraces every class of descriptive words, the meaning of which, is "swamp and overflowed," yet the words of the designation in the case at bar, do not import or convey such

meaning. "Swamp and overflowed" lands, in the ordinary acceptation of those terms in common parlance, are those permanently wet and covered by, or saturated with water, not lands that once in a while, by sudden inundation, in varying and uncertain periods, are covered by an immense body of water which temporarily prevents use or occupation. The former is "swamp" and the latter "inundated," lands. One is a permanent character given to the land, by fixed and unchanging conditions; the other is the temporary effect of sporadic natural operations, changing in no degree the *character* of the land and only removing it temporarily from its natural use as high and dry agricultural ground. The latter class of lands need no "reclamation," the underlying idea and consideration of the swamp grant. It simply needs *protection* from sporadic operations of nature at long and varying intervals. Reclamation means changing the character from one class to another; in the case at bar no change of nature's handiwork is necessary. What nature has already done simply needs protection from accident.

For example: Everyone knows that one of the mightiest rivers on earth, the Nile, overflows its banks in regular and successive intervals, creating thereby a country of unsurpassed fertility and agricultural productiveness. Did any one ever claim that its banks were swamp? The Mississippi is protected for hundreds of miles by banks and levees. Does anyone assert that the lands which otherwise would be reached by its irregular inundations, would be, without such protection, swamp?

As in common parlance and ordinary use, so in respect to technical use in the land jurisprudence of this country, lands subject to periodical inundations have never been understood to be swamp or classed as such. The cases cited by counsel for plaintiff in error do not sustain the proposition they advance in this regard, and authorities to the contrary are abundant.

The practical value, in the case at bar, of extended references to departmental adjudications on this point, may well be doubted. The court will, perhaps, accept them as of some persuasive authority, but it is probably safer to assume that they will assist the court more by way of departmental history than as authorities.

We content ourselves, therefore, in reply to the brief of our opponents, by inviting attention to the fact determinable upon the slightest examination, that in none of the few cases cited does the department hold that lands situated as are those in the case at bar, are swamp or pass under the grant. And we supplement this by a reference to the following cases wherein the Secretary in respect to lands within this very township, including that involved in the case at bar, held and decided that the lands were not designated as swamp and overflowed, and did not inure to the State under the grant of 1850, or the statute of 1866:

Wallace *v.* State of California, 5 Copp. L. O., 22.
State of California *v.* United States, 3 L. D., 521.
Same on Review, 4 *ib.*, 371.
State of California *v.* Fleming, 5 L. D., 37.

In Wallace *v.* The State (*supra*) involving the very land here in question, being the identical decision referred to in Finding XIII, Secretary Schurz said (pages 22, 23):

"The first clause of the said fourth section of the act of 1866 provides that, in cases where the townships had been surveyed by the United States and the plats approved, the lands returned as swamp and overflowed were to be certified to the State without further action; hence no hearing as to the character of the land is necessary.

"In the case under consideration, however, the township was surveyed by the United States prior to July 23, 1866, and the land is returned by the Surveyor-General as subject to 'periodical overflow,' and not as 'swamp and overflowed,' as provided in the statute; hence, *it is not subject to certification to the State by virtue of the return*

of the Surveyor-General. The State, however, claims the land as swamp. A question is thus raised as to the correctness of the return of the officer, and a hearing is requested that the facts in the case may be ascertained. I find nothing in either the act of September 28, 1850, or July 23, 1866, which debars the State of this right; on the contrary, it is expressly guaranteed in the fourth clause of the fourth section above quoted."

In State of California *v.* United States, 3 L. D., *supra*, involving a section cornering on that here in part involved, Acting Secretary Muldrow, after referring more fully to the field-notes of the survey than the same are shown in the case at bar and deciding therein that the land was clearly not swamp and overflowed, added the following (page 524):

"Again, the approved plat of survey of this township and the return of the deputy have been passed upon by this Department in the case of Wallace *v.* State of California, 5 C. L. O., 22, involving the N. W. ¼ of section 23, which corners upon the section embracing the land in controversy. In that case it was held that 'the township was surveyed by the United States prior to July 23, 1866, and the land is returned by the Surveyor-General as subject to 'periodical overflow,' and not as 'swamp and overflowed,' as provided in the statute, hence it is not subject to certification to the State by virtue of the return of the Surveyor-General."

In California *v.* United States, on review, 4 L. D. *supra*, Secretary Lamar said (page 371):

"There can be no question that the returns of the Surveyor-General did not represent said land as swamp and overflowed within the meaning of the act of September 28, 1850. In addition to the adjudication of this Department in the case of Wallace *v.* The State of California, 5 C. L. O., 22, in which it was expressly held that the land in said township was not subject to certification to the State by virtue of the return of the Surveyor-

General, United States Deputy Surveyor Wallace testified at the hearing as follows:

"Q. 'Did you consider this land in question swamp land at the time you made that survey?'

"A. 'No. I considered those distinct from swamp lands. If they had been swamp lands I should have entered it so in my notes.'"

And in California *v.* Fleming, 5 L. D., *supra*, involving land in the same section here in part in question, Secretary Lamar said (page 38):

"The lands in controversy were returned by the Surveyor-General, as 'lands subject to periodical overflow,' and hence, were not subject to certification to the State, by virtue of the return of the Surveyor-General."

We have thus four separate and distinct adjudications by two different Secretaries, one of whom is now an honored member of this court, and one Assistant-Secretary, all holding and deciding that the identical return and designation here in question, was not a designation of the land as "swamp and overflowed" and that such lands did not pass to the State, either under the grant of 1850, or the act of 1866. We submit, that, without further reference to adjudications of the Department in other cases, these decisions are absolutely conclusive, as to the position and rulings of the land department on the question here presented.

In conclusion of this branch of the case and in answer to the statement, outside of the record, found upon page 15 of our opponent's brief, that 2,408.73 acres of lands included in this same marking have been patented to the State as swamp, we take the liberty to say that a greater quantity of lands so marked are shown to have been denied the State and patented to agricultural claimants. And, if further pursuit of this subject is excusable, we venture to assert that the dispositions to

the State, above referred to, were made *ex parte* and unadvisedly, while those made to agricultural claimants were after full investigation and in conformity to the principles of law announced in the decisions above cited.

We submit that upon both reason and authority there was no designation of this land as swamp and overflowed upon any survey or plat, and that the first clause of section four of the act of 1866 has no application.

SECOND CLAUSE OF SECTION 4; ACT OF 1866.

The second clause of the act of 1866 is in the following words:

"The Commissioner shall direct the United States Surveyor-General for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by the State, and when he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly and forward them to the General Land Office for approval."

The proposition is that under the facts found in the case at bar a segregation map had been made by the State showing the land in question to be swamp and overflowed; and although there is no pretense that the Commissioner ever directed the United States Surveyor-General to examine said alleged map, or that such alleged map was ever submitted to the United States Surveyor-General for his examination, or that he ever examined the same, or that from it he ever constructed any plat, yet it is said that under this clause perfect title vested in the State, and that ejectment can be maintained thereon.

At the outset of the discussion of this point three propositions, we think, are enforced by their mere statement.

First. The clause in question is not operative in any

case until the State, in some way, presents to the Commissioner or the United States Surveyor-General for action a map claimed to be a segregation map of swamp and overflowed land. It cannot be supposed that the act charged the Surveyor-General, under general directions of the Commissioner or otherwise, with the duty of himself hunting up from the hundreds of different depositories all the segregation maps prepared by various officers under State laws, and upon his failure to do so, operated itself, *proprio vigore*, to vest title. It was the obvious duty of the State, in some way, to present the segregation maps to the authorities of the United States for action. There is no pretense of any such action in the case at bar.

Second. When so presented the act conferred upon the Surveyor-General the jurisdiction, under direction of the Commissioner and Secretary, to hear and determine the question whether the segregation survey conformed to the system of surveys adopted by the United States. His decision upon that question, under the authorities hereinbefore cited, would be conclusive even in the courts. The State cannot avoid that jurisdiction by failing to present its claims under segregation surveys, and then insist on the benefit of the act exactly as though it had invoked the jurisdiction and had obtained an adjudication in its favor.

Third. If the question of segregation survey can be now raised at all, the decision of the Secretary adverse to the State, recited in Finding XIV, is absolutely conclusive of the question against the State.

Proceeding to the consideration of the question whether any such map ever existed, we submit, with the utmost confidence, that no map, by any possibility to be classed as a "segregation" map, within the meaning of the act of 1866, was ever made by the State.

In the enactment of this provision Congress had in view the fact that under previous legislation of the State such things as segregation maps were in existence. It was these maps and none other that Congress intended should be examined and, under certain contingencies, should be adopted by the United States. The legislation of the State, and the only such legislation then in existence, was the act of May 13, 1861 (Session Laws of 1861, Ch. 352, page 355). That act provided:

"The county surveyors of the several counties of this State shall, immediately after the organization of the Board of Commissioners, proceed to segregate the swamp and overflowed lands within their respective counties from the high lands in said counties, and make complete maps of all the swamp and overflowed lands, within their respective counties, in legal subdivisions of sections and parts of sections, together with a tabular statement of all such lands as have been sold by the State, and under what act the same were sold, of all lands claimed and by whom claimed, and as nearly as possible by what title the same are held, and file the said tabular statement in the County Recorder's Office of their respective counties, also transmit duplicates of said maps to the Surveyor-General of the State: *Provided, however*, That it shall be discretionary with the Board of Commissioners whether land already surveyed and segregated under any former act for the sale and reclamation of swamp and overflowed lands shall be segregated or surveyed under this act. * * * (Sec. 19.)

"The Surveyor-General shall compile a general map of the State in duplicate, showing all the swamp and overflowed lands of the State which shall have been returned by the county surveyors as the property of the State, together with the county boundary lines where crossing the same. He shall also enter thereon the number corresponding with the affidavit; he shall also compile from the testimony received and on file in his office a general schedule of the swamp lands in the State by their description. He shall also distinguish on said map the lands already sold by the State as swamp and overflowed; he shall prepare a report showing any cases in

which the swamp lands have been infringed upon by the United States Government surveys." (Sec. 21.)

No such survey was ever made and none is claimed. The only survey made prior to the act of 1866 was that mentioned in Finding IV. That was a private survey made upon application to the State to purchase the tract in question, and was executed under the act of the State Legislature of April 27, 1863 (Session Laws of 1863, ch. 397, page 591), having no relationship to, and in no manner connected with, the preparation of segregation maps or with the prior act of 1861 upon that subject. It was not a segregation map by any possible legitimate construction. The character and form of such segregation maps were prescribed by the prior act of 1861, and the act of 1863 did not even relate to the same general subject-matter.

The subsequent survey (Finding V) made in 1869, under the act of the State Legislature of March 28, 1868 (Session Laws, 1867–'68, Ch., 415, p. 507), was of exactly the same character. The act itself had no reference to segregation surveys, and no explanation appears for the second application except that stated in the brief of counsel (p. 3), viz.: that the first had disappeared, and, in any event, the survey was subsequent to the Congressional act of 1866, and was not, therefore, within its terms.

In this connection we refer again to the case of Wright *v.* Roseberry, 121 U. S., 488. The opinion in that case defines the exact point, at which, under the act of 1866, any benefit can be claimed under this clause in the absence of favorable action by the United States. In that case a proper segregation map was before the court, and is described in the opinion (pp. 513, 514). We invite particular attention to this recitation. And defining the

point where, in the absence of certification, the State can claim the benefit of this clause, the following proposition, summarized in the syllabus and discussed at length from pages 511 to 518, is announced:

"*After segregation of the lands by the State, and adoption of the segregation surveys by the proper federal officers, the right* of the State's grantees to maintain an action for recovery thereof, cannot be defeated, because such lands have not been certified or patented to the State."

Upon the whole case, we submit that no error appears and the judgment of the Supreme Court of the State should be affirmed.

Respectfully submitted,

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